

Liberty, Community, and the Ninth Amendment

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I. INTRODUCTION

The Ninth Amendment has become a lightning rod for struggle over individual rights in contemporary constitutional theory.¹ This struggle is borne of a conceptual paradigm central to the American political tradition—the liberty/community dichotomy—in which the claims of persons and the claims of community are understood only in opposition to each other. The liberty/community polarity is both a symptom and a cause of the general tendency to think dualistically about political questions that is a characteristic of

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¹ Some recent articles discussing the Ninth Amendment include Randy E. Barnett, *A Ninth Amendment for Today's Constitution*, 26 VAL. U. L. REV. 419 (1991) [hereinafter Barnett, *Today's Constitution*]; Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988) [hereinafter Barnett, *Reconceiving the Ninth*]; Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229 [hereinafter Massey, *Anti-Federalist Ninth Amendment*]; Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49 (1992) [hereinafter Massey, *Natural Law Component*]; Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990). See also THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989) [hereinafter RIGHTS RETAINED] (contains a bibliography of Ninth Amendment scholarship through 1989); *Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37 (1988).

American constitutional decisionmaking.² It acts as a foundational, cognitive structure³ in constitutional theory that drastically reduces the options open for choice when rights claims are made by individuals; either the individual "wins" in what is taken to be a struggle with the community over autonomy, or the community wins and proceeds to submerge the person's being into the group personality of the collectivity.⁴ The liberty/community dichotomy feeds on a vision of liberty that celebrates possessive individualism⁵ and conceives of rights only as a means by which to throw off the cloying and repressive demands of community. The model is one of combat or struggle. There is no room within the paradigm for the idea that rights represent the responsibilities that the good community recognizes and promotes among its members, nor is there room for the belief that rights are important to bring about full human flourishing for all the members of society or to assist us in carrying out the ethical obligations that arise from the relationships in which we find ourselves embedded.⁶

² It has long been a feminist viewpoint that the western intellectual tradition is organized around a number of core dichotomies that generate normative dualism. Simone de Beauvoir identified the self/other antinomy as central to the western rationalist tradition and connected it with women's subordination. See SIMONE DE BEAUVOIR, *THE SECOND SEX* at xxviii (H.M. Parshley ed. & trans., Alfred A. Knopf, Inc. 1953) (1949). Other dualistic oppositions have been identified and critiqued in feminist literature. See, e.g., Caroline Whitbeck, *A Different Reality: Feminist Ontology*, in WOMEN, KNOWLEDGE, AND REALITY 51, 55-58 (Ann Garry & Marilyn Pearsall eds., 1989). The liberty/community dichotomy is closely related to the public/private distinction that is central to the feminist objections to the liberal state. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184-94 (1989); see also Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 475-99 (1988) (book review).

³ As Frances E. Olsen said about the dichotomy of the family and the market, "It limits and impoverishes the ways we experience our affective and productive lives, the possibilities we can imagine for restructuring our shared existence, and the manner in which we attempt change." Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1529 (1983). The liberty/community polarity functions similarly to restrict our constitutional imagination.

⁴ It seems incomprehensible to Robert Nozick, for instance, that individuality and sociality could be complementary. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA passim* (1974).

⁵ See *infra* text accompanying notes 51-54.

⁶ This is a result of the fact that the notion of rights embraced by the liberty/community dichotomy is individualistic. See *infra* text accompanying notes 51-54, 114-21. In contrast, an approach to rights grounded at least initially in the concept of human relationships and the reciprocal responsibilities that arise from them can be associated with the development of an ethics of care out of feminist moral philosophy. The works of Carol Gilligan and Nel Noddings are most closely associated with this viewpoint. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); NEL NODDINGS, *CARING: A*

It is the purpose of this Article to challenge the dichotomy between liberty and community that limits the American constitutional imagination by using the debate over the Ninth Amendment as a foil. Through that device, I intend not only to explain the controversy over the Ninth Amendment, itself, but to reveal the barren nature of the liberty/community paradigm and to suggest how three emerging political theories—modern pragmatism, Aristotelian social democracy, and liberal communitarianism—might converge to provide a reconceptualization of constitutional approaches to the person in society. By so doing, I hope to engage in the expression of what one commentator has called “progressive constitutional faith,”⁷ for it is my goal to critique one of the cornerstones of our constitutional understanding by reference to normative standards that are progressive,⁸ not liberal.

My discussion is both theoretical and historical. In Part I, I identify and describe the reasons why there has been such an intense debate over the Ninth Amendment. I catalog its various interpretations and relate them to a discussion of key cases in which the liberty/community antinomy has dominated. In Part II, I outline the libertarian approach to the Ninth Amendment and the way it seeks to manipulate the liberty/community paradigm to bring about the ideal of the minimal state. In Part III, I show that confusion over whether liberty or community should dominate has been present in American political life from the beginning; as a result, attempts to settle the Ninth Amendment debate by invocation of the Framers’ intent are doomed to failure. Finally, in Part IV, I discuss how the classic impasse between the individual and community that lies at the heart of the Ninth Amendment controversy might be reconceived. I suggest that a combination of modern pragmatism, Aristotelian social democracy, and liberal communitarianism might be used to develop a coherent *and* dynamic fundamental rights jurisprudence, one committed to pragmatic methodology, informed by an appreciation of full human flourishing, and buttressed by a conception of political rights founded in participation.

II. THE NINTH AMENDMENT DEBATE: ITS CAUSES

The debate over the Ninth Amendment is caused by three phenomena. The first is that almost any controversy over individual rights presents a *potential*

FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984). Aristotle’s philosophy can be understood as a historical precursor to such a way of conceptualizing rights. See ARISTOTLE, THE POLITICS 1253a120–28 (describing the connection between community and individuality).

⁷ See Robin L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 792 (1992).

⁸ *Id.* at 792–99.

Ninth Amendment issue. This is particularly ironic because the Supreme Court has never used the Ninth Amendment, standing alone, to resolve any question.⁹ The second reason for the controversy is that like other doctrines associated with unenumerated rights, the Ninth Amendment directly implicates both liberty¹⁰ and community.¹¹ Hence, it creates an occasion for the proponents of

⁹ The point here is that the Ninth Amendment has never been critical to the holding of any majority opinion of the Supreme Court. *Griswold v. Connecticut*, 381 U.S. 479 (1965), is the case most commonly associated with the Ninth Amendment. In that decision, the Ninth Amendment was not used as the critical factor in Justice Douglas's discussion of the privacy right, but was mentioned along with the First, Third, Fourth, and Fifth Amendments in Douglas's explanation of the "penumbras" associated with particular amendments in the Bill of Rights and incorporated against the states by the Fourteenth Amendment. *Id.* at 481-86. It was only in Justice Goldberg's concurrence that the Ninth Amendment played a pivotal role. It was his analysis that the Ninth Amendment, alone, provided significant authority for the proposition that the Constitution embodies a right to privacy, because the Ninth Amendment is meant to authorize the use of unenumerated, inalienable rights as a bulwark against governmental power. *Id.* at 488-93 (Goldberg, J., concurring).

No majority opinion of the Court has adopted Justice Goldberg's analysis. Rather, in most instances when the Ninth Amendment is mentioned, it is one of a number of possible bases for the Court's treatment of a particular question. One example in which the Court mentioned the Ninth Amendment but rested its decision on another basis is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Similarly, *Roe v. Wade*, 410 U.S. 113 (1973), while referring to the Ninth Amendment, also premised the right to an abortion on general conceptions of liberty emanating from the Due Process Clause.

In Patterson's *The Forgotten Ninth Amendment*, the absence of any authoritative interpretation of the Ninth Amendment was treated as a positive good because, in the author's view, there was no precedent that would prevent the Supreme Court from treating it as a monument to individualism. BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 34-35 (1955); see also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 389 n.10 (4th ed. 1991).

¹⁰ By the term "liberty" I refer here to the conception of personal freedom that has dominated western political theory since the Enlightenment. This conception identifies liberty with autonomy, rather than freedom to pursue the common good. See generally C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962), for a discussion of the historical development of this association. Such a notion of liberty rests on a commitment to the metaphysical priority of the individual in relation to the social group by treating groups as mere aggregations of individuals. This metaphysical stance has significant implications for rights and their classification as natural or positive. See *infra* text accompanying notes 114-22.

¹¹ By the terms "community" and "communitarian," I intend to refer to the special role given to the social group in communitarian, civic republican, and majoritarian political theories. This reference is complicated by the fact that the relationship between these theories is complex and its characterization controversial. However, these theories all share an attitude toward public authority that sharply distinguishes them from libertarianism. That

each ideal to fight vigorously for their competing values. Finally, libertarians intend to use the Ninth Amendment in a particular way to bring about a structural change in constitutional understanding by establishing a presumption in favor of individual liberty in constitutional analysis.¹² By doing so, they make fundamental rights jurisprudence largely irrelevant because, by invoking the Ninth Amendment and giving it their particular interpretation, the seesaw of the liberty/community dichotomy is tipped in favor of liberty. Thus, libertarian claims about the Ninth Amendment involve high constitutional stakes¹³ and have made the debate over it that much more intense. In the following subsections, I describe these root causes in more detail.

A. *Unenumerated Rights, the Ninth Amendment, and Related Constitutional Sources*

Almost any case presenting an individual rights claim is a potential Ninth Amendment case. This is true for two reasons. The first is that the Ninth Amendment can act as a conduit for unenumerated rights.¹⁴ The second is that it might be used to establish a generalized liberty right in favor of individuals.¹⁵ Under the first interpretation, the Ninth Amendment functions like natural law, substantive due process, and related principles in constitutional adjudication to support the invocation of particular unenumerated rights, piecemeal.¹⁶ Under the second, a libertarian interpretation that I discuss below, the Ninth Amendment creates a presumption in favor of personal autonomy, a general right to liberty as it were, that places the burden of proof on governments in clashes with individuals.¹⁷ As such, it introduces a structural feature in constitutional analysis that interacts with *any* rights claim, enumerated or unenumerated.

An appreciation of the Ninth Amendment's potential role in constitutional theory starts with its words, which are deceptively simple. It reads: "The

attitude is borne of a profoundly different conception of the person than lies at the heart of classical liberal accounts. See *infra* text accompanying notes 286–89, 303–07.

¹² See *infra* text accompanying notes 114–44.

¹³ Richard Epstein suggests that interpretive questions about liberty raised by constitutional provisions constitute "high stakes game[s]." Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 699 (1992).

¹⁴ See, e.g., Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 310, 313–14 (1936).

¹⁵ See *infra* text accompanying notes 114–44.

¹⁶ See *Griswold v. Connecticut*, 381 U.S. 479, 486–88 (1965) (Goldberg, J., concurring); see also Thomas K. Landry, *Unenumerated Federal Rights: Avenues for Application Against the States*, 44 FLA. L. REV. 219, 233–34 (1992).

¹⁷ See *infra* text accompanying notes 140–43.

enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁸ By its literal terms, the amendment seems to indicate that just because the Framers of the Constitution chose to identify and enumerate specific rights in the first eight amendments and in the body of the Constitution,¹⁹ an inference is not to be made that the enumeration is complete. The people possess other unspecified rights which may be judicially identified and enforced to protect persons against governmental action.

This interpretation, which proceeds from a "plain" reading of the text, backed up by references to the Framers' intent,²⁰ raises the possibility that the Ninth Amendment can be used by the proponents of unenumerated rights to establish documentary warrant for their invocation. As such, it is similar to other principles and provisions developed by the Court to legitimate rights claims lacking specific textual support in the Constitution.²¹ To understand why this is so requires a description of the notion of an unenumerated right and the connection of that description with the various principles the Court has used when enforcing such a right.

By the phrase "unenumerated rights," judges and scholars refer to the

¹⁸ U.S. CONST. amend. IX.

¹⁹ The specific individual rights accorded persons by the express terms of the Constitution are those with which we are well familiar from the first eight amendments—rights such as freedom of speech, freedom from unlawful search and seizure, and the like. In addition, the body of the Constitution includes specific protections against bills of attainder and ex post facto laws, among others. See Kelsey, *supra* note 14, at 311–12 (listing the enumerated rights); see also Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in POWER AND POLICY IN QUEST OF LAW 187 (Myres S. McDougal & W. Michael Reisman eds., 1985).

²⁰ See, e.g., JOHN H. ELY, *DEMOCRACY AND DISTRUST* 34–38 (1980); Barnett, *Reconceiving the Ninth*, *supra* note 1, at 9–23; see also *infra* text accompanying notes 150–51.

²¹ This point was made by Justice Black in his dissent to *Griswold v. Connecticut*, 381 U.S. 479 (1965). He said, "I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court . . . the . . . power to invalidate any legislative act which the judges find irrational, unreasonable or offensive." *Id.* at 511 (Black, J., dissenting). Throughout his dissent, Justice Black referred interchangeably to the various principles that the Court had used in the past to validate recognition of particular rights not mentioned in the Constitution and to the new Ninth Amendment argument presented in Justice Goldberg's concurring opinion. *Id.* He accused Justice Goldberg of "elaborat[ing] the same natural law due process philosophy found in *Lochner v. New York*" through Goldberg's invocation of the Ninth Amendment. *Id.* Justice Black described the Ninth Amendment, penumbral, and due process arguments presented in *Griswold* as "these formulas based on 'natural justice,' or others which mean the same thing." *Id.*

possibility that there are rights not mentioned—fixed, or validated by express language in the Constitution²²—that ought to be identified through court proceedings, on a case-by-case basis, and judicially enforced.²³ The warrant for these rights is thought to derive from two sources: the notion that the Constitution does or ought to incorporate natural law concepts that function to limit the power of the state against individuals,²⁴ and the idea that the Framers actually intended the Constitution to be open textured regarding the issue of rights so that those rights not expressly identified at the founding might receive judicial recognition over time, becoming enshrined in constitutional understanding as a matter of positive law.²⁵

The idea of judicial enforcement of unenumerated rights implicates the liberty/community dichotomy in a particularly intense way because it raises the prospect that the judiciary can oppose the will of the community by enforcing rights that were not expressly agreed to in the original constitutional understanding or in any subsequent amendment of the Constitution.²⁶ By the use of unenumerated rights, courts could prefer the individual over the society and thereby promote liberty over community in constitutional decisionmaking, all without the participation of majoritarian democratic institutions. On the other hand, if the very concept of unenumerated rights was rejected, the community could dominate in constitutional analysis except in those few areas in which a Bill of Rights amendment or a provision in the body of the Constitution confers an express right on the individual in clashes with the state.²⁷ Thus, the debate over unenumerated rights as it is traditionally understood is a debate over whether our constitutional attitude toward rights is

²² Ronald Dworkin recognizes something like this definition of unenumerated rights, although he asserts that the distinction between unenumerated and enumerated rights is specious. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 386–91 (1992).

²³ For a discussion connecting the Ninth Amendment with the issue of judicial enforcement of unenumerated rights, see Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 316–18 (1987).

²⁴ See EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* (1948); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). But see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993) (arguing that vindication of natural rights does not involve “indefinite” or “expansive” processes).

²⁵ See, e.g., Massey, *supra* note 23, at 322 (discussing the states as sources of such positive rights). But see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

²⁶ This was the point of Justice Black’s dissent in *Griswold*. See *Griswold v. Connecticut*, 381 U.S. 479, 511 (1965) (Black, J., dissenting).

²⁷ Hence, the Constitution would be viewed as expressing a majoritarian preference. See Singer, *supra* note 2, at 507–08.

to be positivist and majoritarian or natural and individualistic²⁸—that is, it is the question of whether courts will be required to subject the individual, unprotected by an enumerated right, to the community's will in areas of personal behavior,²⁹ or whether courts will be allowed to give the individual primacy through enforcement of unenumerated rights.³⁰

How does the notion of unenumerated rights play out in the context of particular constitutional doctrines when the Supreme Court identifies a right that does not appear in the first eight amendments of the Bill of Rights or the body of the Constitution? In an understandable effort to obscure the antidemocratic effect of unenumerated rights, the Court has searched for specific constitutional provisions or phrases that might legitimize the Court's recognition of those rights beyond a naked invocation of natural law.³¹ Over the Court's history, express provisions that particularly lent themselves to this use were the Contract Clause, the Privileges and Immunities Clause, and, after Reconstruction, the notion of substantive due process that was developed from the Fourteenth Amendment.³²

Regardless of the particular provision used as the starting point for unenumerated rights, the Court in each instance was forced to go beyond the words in the Constitution to justify the selection of a particular right for judicial enforcement. In addition, the limited text for unenumerated rights could not provide the rationale for the actual selection made. To put it differently, while the Contract Clause, the Privileges and Immunities Clause, and the notion of substantive due process might have provided minimal warrant for the creation of rights not specified in the Constitution, they did not expressly authorize the choice of any particular unenumerated right over another in disputed contexts.³³ Thus, the function of these constitutional devices proved to be very similar, if not identical, for they all made up the barest gesture, but a gesture

²⁸ The libertarian interpretation would impede community at the state level by allowing unenumerated rights developed through federal constitutional law to be incorporated against the states to prevent certain values and practices from being promoted through state legislation. *See generally* Landry, *supra* note 16; Earl M. Maltz, *Individual Rights and State Autonomy*, 12 HARV. J.L. & PUB. POL'Y 163 (1989).

²⁹ This is, of course, just what the Court allowed in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See also infra* text accompanying notes 105–13.

³⁰ This is the primary use in Patterson's view of the Ninth Amendment. *See* PATTERSON, *supra* note 9, *passim*.

³¹ This can be understood as an attempt to preserve the facade of interpretivism. *See* ELY, *supra* note 20, at 11–41.

³² *Id.*; *see also* Landry, *supra* note 16, at 232–45.

³³ This is implicit in Ely's treatment of the Ninth Amendment itself. ELY, *supra* note 20, at 34–41.

only, toward the broad notion of unenumerated rights.³⁴

If the constitutional provisions used to "create" unenumerated rights could not dictate which ones to select for recognition, much less provide positive content for them, what was going on when the Court did identify a specific, but unenumerated, right for enforcement? Most simply put, the Court was struggling to develop a fundamental rights jurisprudence³⁵ within the long shadow of the liberty/community dichotomy.³⁶ However, the presence of that paradigm fettered the Court's ability to develop a coherent account of fundamental rights, one that would be founded both in a vision of the good society and the flourishing human being. What is important to understand for now is that the Ninth Amendment constitutes another source to support the general idea of unenumerated rights, one that functions similarly to the Contract Clause, the Privileges and Immunities Clause, and substantive due process.

Notwithstanding the Ninth Amendment's similarity to these doctrines and principles, it lay dormant for one hundred and fifty years until Justice Goldberg gave it a central role in his concurring opinion in *Griswold v. Connecticut*.³⁷ Instead, from *Calder v. Bull*³⁸ through cases such as *Trustees of Dartmouth College v. Woodward*,³⁹ *Dred Scott v. Sandford*,⁴⁰ *Lochner v. New York*,⁴¹ *Griswold v. Connecticut*, itself,⁴² and even *Bowers v. Hardwick*,⁴³ the Supreme

³⁴ See Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 437 (1992).

³⁵ See ELY, *supra* note 20, at 43-72.

³⁶ See Singer, *supra* note 2, at 506, 528-32.

³⁷ 381 U.S. 479, 488-93 (1965) (Goldberg, J., concurring). For a general discussion of the meaning and significance of *Griswold*, see *Symposium: The Twenty-Fifth Anniversary of Griswold v. Connecticut*, 23 CONN. L. REV. 853 (1991).

³⁸ 3 U.S. (3 Dall.) 386 (1798) (discussing natural law).

³⁹ 17 U.S. (4 Wheat.) 518 (1819) (using the Contract Clause to prohibit state control of a private college).

⁴⁰ 60 U.S. (19 How.) 393 (1856) (discussing the power of Congress to limit, as violations of substantive due process, "vested" property rights in slaves pursuant to the Missouri Compromise).

⁴¹ 198 U.S. 45 (1905) (invalidating on due process grounds New York labor legislation, categorizing it as state law directed to an improper purpose) *overruled by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

⁴² 381 U.S. 479 (1965) (using the penumbra of the First, Third, Fourth, Fifth, and Fourteenth Amendments to establish a marital privacy right and to strike Connecticut's anticontraception legislation).

⁴³ 478 U.S. 186 (1986) (discussing privacy, equal protection, and cruel and unusual punishment, among other things, as possible bases for invalidating Georgia's antisodomy laws).

Court discussed and sometimes used an assortment of other constitutional provisions to provide bare documentary support for unenumerated rights. Finally, in *Griswold*, the Ninth Amendment was recognized as another such provision.

What does the convergence of these principles reveal for an understanding of the debate over the Ninth Amendment in particular and the phenomenon of the liberty/community paradigm in general? Primarily, it reveals that the Court has no coherent account, theory, or approach for selecting from all the possible unenumerated rights those that ought to be designated as fundamental and judicially enforced. Moreover, because a revitalization of the Ninth Amendment requires such an account, theory, or approach, the current debate over it cannot be easily resolved. In this way, the liberty/community paradigm has limited the creation of a meaningful fundamental rights jurisprudence, while also functioning as an obstacle to understanding the real role of the various principles, phrases, and provisions that have been used by the Court in its struggle to develop such a jurisprudence. This result is not surprising, given the power of the liberty/community dichotomy to limit our conceptions of the person and society, and the dichotomy's easy appropriation by dominant groups within our polity.

The paradigm has retarded development of a contentful conception of the good community *and* a positive notion of personhood through Supreme Court decisions.⁴⁴ We see the members of the Court straining to determine who won the struggle over rights that they believe occurred at the founding of our nation—the proponents of liberty or the backers of community. Thus, any starting point for fundamental rights jurisprudence in traditional constitutional inquiry begins with the question of whether the claimed right appears specifically in the Bill of Rights or in the body of the Constitution.⁴⁵ If the answer is in the affirmative, it fits into what the “winners” dictated. If not, then the Court strains to determine whether the right invoked is so important that it can act to block the claims of the community. The Court has stricken legislation and recognized particular rights using a series of magic incantations:

⁴⁴ This view is implicit in Robin West's criticism of the terms of the debate over interpretative questions in constitutional theory. West, *supra* note 7, at 766–70. The Supreme Court's unwillingness to face normative issues head on has formed a core part of the critique of American legal institutions coming from the critical legal studies movement, critical race theory, and feminism, among others. See Singer, *supra* note 2, at 533.

⁴⁵ Even an enumerated right may not be treated as fundamental. For instance, the whole debate over the incorporation doctrine begins with an inquiry concerning which of the specific guarantees contained in the Bill of Rights are fundamental enough to supersede the laws of each state. See generally CHARLES FAIRMAN & STANLEY MORRISON, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY* (1970).

legislation or practices fall because they "shock the conscience,"⁴⁶ or a right is enforced because it is "so rooted in the traditions and conscience of our people as to be ranked fundamental,"⁴⁷ or it is "basic to a free society,"⁴⁸ or it is "implicit in the concept of ordered liberty."⁴⁹ All of these phrases, however, constitute mere slogans without content.⁵⁰ The Court presumes that either liberty or community will prevail, but not both. In its attempt to determine the winner, it disregards the ways in which personhood and human flourishing are dependent on the good society, and the good society is, in turn, dependent on personhood and human flourishing.

The liberty/community antinomy not only turns rights claims into zero-sum competitions, thereby retarding development of positive notions of personhood and the good society, it also has more sinister effects. It obscures disparities in political power that exist in the dominant culture, and it is easily manipulated by ascendant sectors of the community, preventing others from effectuating changes in their marginalized condition. As a result, it creates serious problems for governmental legitimacy in an allegedly democratic system. These unfortunate consequences stem, first, from the fact that the paradigm recognizes only one conception of rights and, second, that the paradigm ignores both the difference between formal government and civil society *and* the reality that civil society is often a source of the ruthless appropriation of some members of the community as resources for others.

Although the liberty/community dichotomy constitutes a polarity, the actual vision of rights that it does include on the "liberty" side of the dualism is one of possessive individualism.⁵¹ According to this view, rights are conceived as properties of individuals, not groups, and are used to cloak the person from group interference,⁵² not to disturb raw power relations that occur in the non-governmental sphere of the polity.⁵³ Thus, the liberty/community dichotomy

⁴⁶ *Rochin v. California*, 342 U.S. 165, 172 (1952), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴⁷ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled on other grounds by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁴⁸ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

⁴⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁵⁰ For a catalog of the various phrases that the Court has used to explain the notion of a fundamental, unenumerated right, see Justice Black's list in his dissent in *Griswold v. Connecticut*, 381 U.S. 479, 511-12 n.4 (1965).

⁵¹ For a discussion of the development in political theory of the identification of liberty with individual autonomy, see C.B. MACPHERSON, *supra* note 10, at 263-64.

⁵² See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 133-34 (1960); see also STEVEN LUKES, *INDIVIDUALISM* 73 (1973) (arguing that individuals' rights exist regardless of the state or society).

⁵³ This is the point of Catharine MacKinnon's critique of the liberal state. See

creates a situation in which one either has individual rights that are negative and are used to shield one from formal legal control exerted by city, state, or federal governments, or one has no rights that can be used to better one's marginalized position in the community because rights are wholly a function of communal will.⁵⁴

Such a conception makes rights almost completely unworkable as devices on which outgroups can rely to reach systematic discrimination that permeates the entire society. It does so by ruling out of bounds claims that could be made through the courts if a different conception of rights were admitted. As such, the liberty/community dichotomy creates a boundary that effectually removes an unconventional conception of rights from constitutional analysis, one that treats groups as possible possessors of rights, one that portrays rights as positive as well as negative, and one that employs positive rights to effect "private" power relations. In this way, the liberty/community paradigm impedes the otherwise natural focus of attention on disparities in raw power relations existing in the civil society. The paradigm functions to restrict the dialogue surrounding rights and power much in the same way as the state action doctrine.⁵⁵ Moreover, it contributes to maintaining another dichotomy

MACKINNON, *supra* note 2, at 164-65.

⁵⁴ In this way, a negative conception of rights consigns marginalized persons to whatever treatment will be meted out to them in the general society and attempts to maintain a line between formal government and civil society. For a historic critique of the state/civil society division in liberal theory, see generally KARL MARX, *On the Jewish Question*, in *SELECTED WRITINGS* 39 (1977). For a more recent criticism of the distinction and one that explicitly links it with the public/private dichotomy, see Olsen, *supra* note 3, at 1504-06.

⁵⁵ The state action doctrine has its birth in the restrictive interpretation given to the Fourteenth Amendment in *In re Civil Rights Cases*, 109 U.S. 3 (1883). Those cases raised the issue of whether the newly enacted Fourteenth Amendment provided support for Congress's power to prohibit, by the Civil Rights Act of 1875, acts of racial discrimination perpetuated by private suppliers of public accommodations. *Id.* at 10. As the Court stated:

[The Fourteenth Amendment] does not invest [C]ongress with power to legislate upon subjects [that] are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize [C]ongress to create a code of municipal law for the regulation of private rights Positive rights and privileges are undoubtedly secured by the [F]ourteenth [A]mendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges

Id. at 11.

Shelley v. Kraemer, 334 U.S. 1 (1948), is the modern precedent concerned with the state action doctrine. It greatly expanded the definition of state action for purposes of the Fourteenth Amendment. *Id.* at 14-18. For a general treatment of the contemporary state action doctrine, see *Symposium on the State Action Doctrine of Shelley v. Kraemer*, 67

central to American constitutional decisionmaking—that of the public versus the private. Either liberty and the private sphere are chosen and made ascendant, or community and the public sphere are preferred; the fundamental assumption is that there is a difference between the two that ought to be recognized and reflected in legal decisions.⁵⁶

While it functions to obscure the real relations between various groups that make up the community, the liberty/community dichotomy also acts as a powerful tool which can be utilized by dominant sectors of the polity to stave off social change. When changes occur in the formal political arena through the passage of legislation that actually functions to alter power relations, such legislation can be stricken by choosing the liberty side of the dichotomy. *Lochner v. New York*⁵⁷ can be analyzed as reflecting such a use of the paradigm, as can *Dred Scott v. Sandford*⁵⁸ and a decision as recent as *City of Richmond v. J.A. Croson Co.*⁵⁹ On the other hand, when the interests of dominating groups are exhibited in legislation or state policies to the detriment of persons who have been marginalized by the community (both in civil society and formally through laws), the judicial decision can be written in terms of deference to state prerogatives or majority will, while the fact of marginalization continues. This technique of oppression is at work in cases such as *Bradwell v. Illinois*⁶⁰ and *Minor v. Happersett*,⁶¹ which denied women rights and furthered a legal system that provided for their exploitation as resources for male use, as well as in decisions such as *Korematsu v. United States*⁶² and *Bowers v. Hardwick*,⁶³ in which the civil rights claims of

WASH. U. L.Q. 673 (1989); see also Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988).

⁵⁶ For a discussion of the public/private distinction in the context of modern pragmatism, see Frank I. Michelman, *Private Personal But Not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783 *passim* (1990).

⁵⁷ 198 U.S. 45 (1905), *overruled by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

⁵⁸ 60 U.S. (19 How.) 393 (1856).

⁵⁹ 488 U.S. 469 (1989). Of course, *Croson* is further complicated by the complexities of equal protection analysis in the context of affirmative action. *Croson* involved overt race-based classifications, which were found by the majority to require a strict level of scrutiny and a compelling state interest to overcome that level of scrutiny. *Id.* at 493–511. My point is that at the highest level of description, the municipality was prevented from pursuing its vision of the good in order to vindicate the right of contractors to do business as they chose without the need to order their behavior to the goals of affirmative action.

⁶⁰ 83 U.S. (16 Wall.) 130 (1872).

⁶¹ 88 U.S. (21 Wall.) 162 (1874).

⁶² 323 U.S. 214 (1944).

⁶³ 478 U.S. 186 (1986). *But see* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 235–37 (1987) (criticizing *Bowers*).

marginalized groups were sacrificed in response to the fears of the majority.

By limiting the vision of rights to just one model, by ignoring the injustices that occur in civil society, and by providing a legal resource that can be used to the advantage of groups with inordinate political power, the liberty/community polarity functions to limit the voice of persons and groups, such as women and minorities, to which the fundamental assumptions of the liberal state do not apply.⁶⁴ As such, it silences certain subordinated groups and acts as a barrier to their participation in the legal processes that are essential to the overall legitimacy of our governmental regime. This polarity thus increases the likelihood that current governmental institutions, though superficially democratic, cannot be legitimated.⁶⁵

When the aforementioned effects of the liberty/community paradigm are considered, it is not surprising that the fundamental rights decisions it has spawned are incoherent. The Supreme Court has decided cases that identify travel,⁶⁶ voting,⁶⁷ procreation,⁶⁸ marriage,⁶⁹ and fair criminal⁷⁰ and civil procedure⁷¹ as rights fundamental enough to tip the liberty/community seesaw in the direction of liberty. Yet, the reasons why these rights ought to be deemed fundamental were never really articulated with reference to any positive conception of the person or of society, nor were they meaningfully related to the rights claims presented by groups without significant political power. At the same time, rights more obviously critical to human flourishing were not protected—rights to shelter, education, and the like.⁷²

In what follows, I will examine several classic constitutional cases involving unenumerated rights to show the power of the liberty/community dichotomy as I have described it. Many of the cases are thought to be in conflict. The original point that I hope to make beyond connecting them with the Ninth Amendment is that all are confined within the boundaries of the liberty/community paradigm. In the cases described, one will see a constitutional tug-of-war, where at one point liberty is ascendant and, at another, the ideal of community is dominant. What will not be shown is any

⁶⁴ See MACKINNON, *supra* note 2, at 204.

⁶⁵ *Id.* at 157-70.

⁶⁶ See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁶⁷ See *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁶⁸ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁶⁹ See *Loving v. Virginia*, 388 U.S. 1 (1967).

⁷⁰ See *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁷¹ See *Connecticut v. Doe*, 111 S. Ct. 2105 (1991); *Fuentes v. Shevin*, 409 U.S. 902 (1972); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁷² See generally Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (comparing and contrasting the judicial and legislative branches as sources for the development and protection of welfare rights).

sort of sustained effort to explore the possibility of complementary relations between these norms or any attempt to develop a rights theory based on the interaction between the community and its members.

B. *Liberty and Community from Lochner to Bowers*

The case most associated with liberty on the model of possessive individualism is *Lochner v. New York*.⁷³ *Lochner* stands for the excesses of substantive due process at its height, but *Lochner's* significance for my discussion lies in the joint perception of the majority and Justice Harlan, in dissent, that the case required a choice between individual liberty and the communal welfare.

Lochner involved a criminal prosecution of an employer under a New York labor law limiting the hours that workers could work in a bakery.⁷⁴ Justice Peckham, writing for the majority, viewed the initial issue presented to be the extent to which the State of New York could limit the general right of employers and employees to contract with each other, a right protected by the Fourteenth Amendment.⁷⁵ More generally, the majority perceived that the question was "which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."⁷⁶

The majority recognized that a state's *legitimate* exercise of its police power constitutes no substantive deprivation of due process. However, the majority's conception of what was legitimate was limited by the model of liberty conceived in opposition to community. This tendency to understand the issues in dichotomous terms was exacerbated by two additional factors: the majority's unexamined belief that the individual ought to prevail over the social group in American constitutional jurisprudence,⁷⁷ and its belief that the ideal state has minimal duties that do not include providing for the common good by explicitly promoting normative values.⁷⁸ Thus, the majority rejected as a justification for the statute "the interest of the State that its population should be strong and robust"⁷⁹ or the purpose "to regulate the hours of labor between the

⁷³ 198 U.S. 45 (1905), *overruled by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

⁷⁴ *Id.* at 46.

⁷⁵ *Id.* at 53.

⁷⁶ *Id.* at 57.

⁷⁷ *Id.*

⁷⁸ *Id.* at 57–58.

⁷⁹ *Id.* at 60.

master and his employ  s [sic].”⁸⁰ Instead, the Court claimed that for New York’s police power to be justified, the state’s legislation “must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate.”⁸¹ In its own view New York could not validate its labor legislation as an effort to promote the communal welfare; only a clear showing that regulation of bakers’ work hours was necessary to directly protect their health or the safety of the products they produced would authorize state intervention.

Justice Harlan’s dissent in *Lochner* also took the liberty/community paradigm as given, but reversed the order of dominance between the terms. For Harlan, majority will was entitled to dominate on questions of means *and* ends, limited only by those constitutional provisions and doctrines that specifically conferred protection on the individual against legislative majorities.⁸² Not surprisingly, Harlan took a much broader view of the police power. He wrote that “liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society.”⁸³ Unlike Justice Peckham, he believed that legislation should be treated as presumptively legitimate when individual rights claims are invoked to invalidate it. In diametric opposition to the approach of the majority, Harlan’s dissent placed the burden of proof on the individual in contests with the state over legislation. Thus, he wrote:

[T]he rule is universal that a legislative enactment . . . is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power, [and] when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional.⁸⁴

While the dissent’s approach to the issues raised by *Lochner* eventually prevailed in the political struggle that was the New Deal, my criticism of the decision goes deeper than a preference for community over liberty. It is *Lochner*’s confinement to the parameters of the liberty/community paradigm that makes it an unworkable case. At the time of the decision Justice Holmes similarly understood its limitations. In a brief dissent in which Justice Holmes agreed with Justice Harlan that legislative majorities are entitled to attempt to achieve their conceptions of the good through state power, he wrote that “[a] constitution is not intended to embody a particular economic theory, whether of

⁸⁰ *Id.* at 64.

⁸¹ *Id.* at 57.

⁸² *Id.* at 69 (Harlan, J., dissenting).

⁸³ *Id.* at 68.

⁸⁴ *Id.*

paternalism and the organic relation of the citizen to the State or of *laissez faire*.”⁸⁵ This was nothing less than a rejection of the liberty/community dichotomy itself, for each contending “theory” referred to by Holmes embodied either liberty or community, dichotomously understood.

The court-packing scheme of President Roosevelt, along with the realities of depression economics, contributed to a repudiation of the libertarian philosophy of *Lochner*. By the late 1930s, the dominance of liberty over community ceased. While *West Coast Hotel Co. v. Parrish*⁸⁶ signaled the Court’s retreat from substantive due process, the case most famous for this sea change in attitudes was *United States v. Carolene Products Co.*⁸⁷

The Court in *Carolene Products* upheld the validity of the federal “Filled Milk Act”⁸⁸ against attack on Commerce Clause, Due Process Clause, and Equal Protection Clause grounds, specifically holding that regulatory legislation is entitled to a presumption of constitutionality so long as “it rests upon some rational basis within the knowledge and experience of legislators.”⁸⁹ By requiring only a minimal standard for validation of legislation, the Court effectively embraced the background paradigm of the liberty/community dichotomy, but, just as Justice Harlan did in his *Lochner* dissent, reversed the terms. Thereafter, the communal determination of ends, as reflected in economic and social welfare legislation, was to dominate.

The ascendancy of community over liberty was not completely effectuated in *Carolene Products*. In celebrated footnote four of the opinion, the Court suggested three situations in which communal judgments about means and ends might be subjected to a standard of justification higher than that of rational relation: (1) “when legislation appears on its face to be within a specific prohibition of the Constitution;”⁹⁰ (2) when legislation is directed toward “discrete and insular minorities;”⁹¹ and, most ambiguously, (3) when legislation might restrict the exercise of a fundamental right.⁹²

When *Carolene Products* is read as a whole, two distinct approaches to rights emerge. The first embraces the liberty/community paradigm and simply reverses the importance of the terms. The second contains the rationale for the development of fundamental rights theory combined with a concern for the special claims of the politically marginalized. As a result, *Carolene Products*

⁸⁵ *Id.* at 75 (Holmes, J., dissenting).

⁸⁶ 300 U.S. 379 (1937).

⁸⁷ 304 U.S. 144 (1938).

⁸⁸ 21 U.S.C. §§ 61–63 (1923).

⁸⁹ *Carolene Products*, 304 U.S. at 152.

⁹⁰ *Id.* at 152 n.4.

⁹¹ *Id.* at 153 n.4.

⁹² *Id.* at 152 n.4.

did not end the Court's willingness to entertain rights claims that were not authorized by express constitutional provisions. In the ensuing years, the Court developed the notion of equal protection in intricate detail to address the problem of discrete and insular political minorities.⁹³ The Court also struggled to develop a conception of fundamental rights that would be used in conjunction both with due process and equal protection principles. Unfortunately, the notion of fundamental rights proved incoherent as it unfolded.

From *Carolene Products* in 1938, through, and including *Bowers v. Hardwick*⁹⁴ in 1986, the Court struggled to identify the unenumerated rights it believed deserved special protection. This struggle went on in the absence of any positive conception of human flourishing, of the good society, or of political participation and was informed by no determinate methodology, pragmatic or otherwise. The most incoherent right within the umbrella of the developing fundamental right jurisprudence was the right to privacy. Ironically, that is the right most closely associated with the Ninth Amendment. Even more ironically, one of the cases most clearly exhibiting the incoherence of fundamental rights doctrine, *Griswold v. Connecticut*,⁹⁵ is the best example we have of a Ninth Amendment decision.

Griswold is important for a number of reasons. It shows the confusion over the question of what qualifies a claimed right for designation as "fundamental" in American constitutional theory, and it also demonstrates how the Ninth Amendment overlaps and intersects with other sources the Court has used to vindicate unenumerated rights. *Griswold* involved a challenge to Connecticut's anticontraception statute brought by a Planned Parenthood director and doctor.⁹⁶ Although a majority voted to strike the Connecticut law, their reasons for doing so were diverse and reflected the basic confusion infecting fundamental rights cases.

Justice Douglas's opinion—the opinion of the court—is the most famous, because through it he unveiled his doctrine of the penumbra of the Bill of Rights.⁹⁷ Douglas was hampered in his efforts to explain why Connecticut should not have the power to proscribe birth control use by married persons because of the Court's own rejection of substantive due process years before in

⁹³ See generally Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

⁹⁴ 478 U.S. 186 (1986).

⁹⁵ 381 U.S. 479 (1965).

⁹⁶ *Id.* at 480.

⁹⁷ *Id.* at 484–85.

Carolene Products. Instead of relying on the approach of *Lochner*, Douglas fashioned a right of privacy from the intersection and logical projection of the express constitutional rights found in the First, Third, Fourth, Fifth, and Ninth Amendments as incorporated through the Fourteenth Amendment.⁹⁸

Justice Goldberg agreed with the result, but wrote a concurring opinion to establish the centrality of the Ninth Amendment, both to the developing privacy right and to the notion of fundamental, but unenumerated, rights in general. For Goldberg, the Ninth Amendment stood as direct evidence that the Framers of the Constitution believed "there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."⁹⁹ Goldberg used the Ninth Amendment as the chief justification for giving judicial enforcement to an unenumerated, but fundamental, right of privacy in marriage saying that "a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment."¹⁰⁰

Justice Black wrote a vehement dissent in which he associated the Ninth Amendment with other sources that the Court used to invalidate legislation thought to limit individual liberty.¹⁰¹ For him, democratic norms required that the Constitution be strictly construed and that only those rights expressly given to the individual by the community in a Bill of Rights guarantee or elsewhere could be invoked to protect persons against intrusion. In his opinion, the various approaches of Justices Douglas, Goldberg, Harlan, and White constituted nothing less than a return to *Lochner*.¹⁰²

Once again, in *Griswold*, the liberty/community paradigm served to limit the ability of the justices to imagine any other way to approach the question of whether Connecticut's law should be upheld than by picking one norm over the other. For Justices Douglas, Goldberg, and Harlan, it was shocking to conceive that the right of a person to procreate within the context of the marriage relationship could be challenged by the state, thus they attempted to find a basis upon which to elevate the norm of liberty over community in the marital context. For his part, Justice Black could think of no way to limit the community's will on contraception, except by reference to the cumbersome process of constitutional amendment.¹⁰³ As basic as the disagreement between

⁹⁸ *Id.*

⁹⁹ *Id.* at 488 (Goldberg, J., concurring).

¹⁰⁰ *Id.* at 491.

¹⁰¹ *Id.* at 511 (Black, J., dissenting).

¹⁰² *Id.* at 514–16.

¹⁰³ *Id.* at 522.

the justices seems, however, it takes place against the backdrop of the liberty/community model and, in fact, is made possible by a premise shared by all of them—that the claims of liberty and the claims of community are in ineluctable conflict. Nowhere in the opinion is an attempt made to link privacy, either within the context of marriage or not, to the viability of community. At no point do any of the justices try to articulate how privacy in marriage, or otherwise, contributes to human flourishing. This inability or unwillingness to articulate a positive conception of personhood has continued to infect constitutional theory on the Ninth Amendment and fundamental rights up to present day.¹⁰⁴ The most recent decision exhibiting this unfortunate result is *Bowers v. Hardwick*.¹⁰⁵

In *Bowers*, the majority rejected the Ninth Amendment as a basis for decision.¹⁰⁶ The Ninth Amendment, however, was cited by respondent Hardwick¹⁰⁷ and relied on by the court of appeals to establish a general right to privacy that would protect Hardwick's ability to engage in homosexual sex within his home.¹⁰⁸ In an opinion that echoed the majoritarian theme running through his concurrence in *Griswold*, Justice White's opinion for the Court constitutes a ringing vindication of the community's right to determine values for all its citizens, even in the bedroom. Justice White did not relate the issue of homosexual sex to the flourishing of the individual or the community, nor did he inquire generally about the importance of sexual expression for personhood. Rather, he analyzed the problem within a world view limited by the liberty/community dualism. In an analysis of the controversy in which he conceived of his choices to be either a return to *Lochner*, or to subject the plaintiff to the community's will, White chose the community. He stated:

The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due

¹⁰⁴ While it is beyond the scope of this Article to recapitulate the abortion debate, *Roe v. Wade*, 410 U.S. 113 (1973), should be mentioned here along with cases like *Griswold* because *Roe* constitutes an extreme example of the way that the liberty/community paradigm continued to fetter constitutional thinking. The only way that the majority could find to vindicate a woman's fundamental right to an abortion was to abolish a potential rights claimant, the fetus, by establishing a continuum of personhood. *Id.* at 156–58. It was as if things were complicated enough for the Court in its attempt to choose between the liberty claims of the mother and the demands of the community without adding another factor in the form of another rights claimant. Rather than give up the two-valued thinking that the paradigm demands and be forced into a multi-factorial analysis, the Court simply removed the third factor by redefining personhood, thus removing the rights claimant. *Id.*

¹⁰⁵ 478 U.S. 186 (1986).

¹⁰⁶ *Id.* at 186.

¹⁰⁷ *Id.* at 201 (Blackmun, J., dissenting).

¹⁰⁸ *Id.* at 189.

Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree¹⁰⁹

Justice Blackmun's dissent was also limited by the liberty/community paradigm. He claimed that the issue presented was not about whether the particular right to engage in homosexual sex should be chosen from possible unenumerated rights and thereafter enforced, but "about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"¹¹⁰ Much of Blackmun's opinion was taken up in a quarrel with the majority over the significance of prior cases on privacy. He demonstrated that the previous precedents had established broad claims to decisional and spatial privacy¹¹¹ that were implicated by the Georgia statute, but he went on to connect those rights with a more general assertion about the role of liberty in a person's life that rings with approval for the notion central to possessive individualism—self-ownership. As Blackmun stated, "We protect those [privacy] rights not because they contribute . . . to the general public welfare, but because they form so central a part of an individual's life. '[T]he concept of privacy embodies the "moral fact that a person belongs to himself and not others, nor to society as a whole."'"¹¹² Similarly, Blackmun denied that the general community could have an interest in Hardwick's participation in homosexual sex. "This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest"¹¹³

In *Bowers*, the proponents of community values had more votes than the defenders of individual liberty, so Hardwick's claim to freedom from communal interference in his sex life was rejected. But the fundamental structure of the decision was dictated by the same factor found in *Lochner*, *Carolene Products*, and *Griswold*—the liberty/community paradigm. In each case, the position of the majority or of the dissent can be linked to one of the values in this foundational constitutional polarity.

So far, I have asserted at least two related claims about fundamental rights. First, although it has used various constitutional provisions to provide documentary support for invocation of unenumerated rights, the Court cannot avoid the need for an overt fundamental rights jurisprudence. Second,

¹⁰⁹ *Id.* at 196.

¹¹⁰ *Id.* at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

¹¹¹ *Id.* at 204.

¹¹² *Id.* (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring)).

¹¹³ *Id.* at 213.

fundamental rights jurisprudence has not developed coherently as a result of the limiting effect of the liberty/community paradigm and its easy manipulation by dominating political groups. These effects stem from the power of the paradigm to influence members of the Court to believe that liberty and community are opposites and that the claims of individuals can only be vindicated by subtracting from the claims of community. This belief is buttressed by extreme discomfort with the notion of using overtly normative approaches to constitutional questions. From a libertarian perspective, the individual's choice of a particular good to pursue is determinative, unless her choice directly harms another in a physical or pecuniary sense. From the communitarian/majoritarian stance, the community's choices about ends are dominant, unless they violate a right specifically identified in the text of the Constitution or closely related thereto. These phenomena make the promise of *Carolene Products's* footnote four unrealized, because for that small rift in the closed space of the paradigm to have been meaningfully enlarged, the Court would have had to jettison its dualistic thinking and address the difficult but worthy questions of what makes a person a fully flourishing human being and what makes a good society. In the absence of such a willingness, it is not surprising that results of the Court's approach to fundamental rights over the years have not consistently promoted either personhood or community.

However, the debate over the Ninth Amendment has not just been a debate over whether and how fundamental rights jurisprudence should be developed. Libertarians would not limit the Ninth Amendment to its role as a conduit for unenumerated rights that could be identified on a case-by-case basis. For them, the Ninth Amendment has promise as the source for a structural change in the constitutional understanding of the basic relation of the person to society. In their view, this relation can be used to establish a general presumption in favor of liberty that would permeate constitutional analysis and make the step-by-step development of fundamental rights largely irrelevant. For libertarians, the Ninth Amendment has the ability to bring about the normative ideal of the minimal state. To see just how and why requires an understanding of the notion of the minimal state itself and the libertarian conception of individual rights.

III. THE NINTH AMENDMENT AND THE MINIMAL STATE

Libertarians use the Ninth Amendment in a particular way that further fuels the general controversy over that Amendment. For libertarians, the Ninth Amendment is a means to reintroduce the normative ideal of the minimal state.¹¹⁴ Their particular interpretation interacts with the way rights conceived

¹¹⁴ This ideal especially dominated in American constitutional law in the nineteenth

on the model of possessive individualism function to limit communal will.

When rights are understood in a certain way, they cause the domain in which the state may pursue communal goals to become smaller and smaller as individuals, by gaining more rights, are immunized from governmental action. If this domain is restricted enough, it results in the notion that Robert Nozick has made current, the notion of the minimal state.¹¹⁵ Nozick states:

Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do.

....

[A] minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts and so on, is justified . . . [A]ny more extensive state will violate persons' rights not to be forced to do certain things¹¹⁶

Nozick's claims about the minimal state rest on important, but unexpressed, assertions about the logic of rights. Because similar assertions lie at the core of the political controversy over whether to use the Ninth Amendment and how to interpret it, they bear scrutiny here.

Nozick's view that a right functions to rule out communal control over the individual's action within the sphere of the right's application is a suppressed premise of the libertarian notion of the minimal state. By its nature, such a right is thought to establish a domain of personal moral/political space that is beyond the boundary of the social group's reach. In order for rights to function in this fashion, they must satisfy several conditions: (1) they must derive from individuals, not groups, *i.e.*, they must be possessions or properties of individuals; (2) they must be negative; and (3) they must be absolute.¹¹⁷ Not surprisingly, Nozick and others describe rights in just this fashion.¹¹⁸

century from the post-Civil War period until the New Deal. See BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT 174-82* (1993).

¹¹⁵ NOZICK, *supra* note 4 at ix.

¹¹⁶ *Id.*

¹¹⁷ See MICHAEL FREEDEN, *RIGHTS 28-37* (1991).

¹¹⁸ But why should it be thought that rights have any or all of these attributes? A gap in Nozick's argument is that he assumes the warrant for individual rights possessing these characteristics from the bare fact of the separate nature of human existence. See NOZICK, *supra* note 4, at 33. Such an assumption might be supported by reference to Kantian arguments about the sovereign nature of rational beings, by foundational claims rooted in the Lockean state of nature theory, or even by appeals to intuition, among other sources. In fact, Nozick makes reference to all three. *Id.* Nonetheless, he does not construct a real argument for this initial premise. For a further discussion of Nozick's view, see Thomas

A theory of individual rights founded on these premises gives rise to the specter of the minimal state. Given the ontological priority of the individual and the concomitant derivative nature of the communal group central to that vision, social space is possible only in the residue of individual space.¹¹⁹ Hence, the greater the number of individual rights, the larger the personal domain and the smaller the available residue of social space. Nozick recognizes the logical possibility that the domain of the personal could be so large, so all encompassing, that even the minimal state could not be established without serious rights violations.¹²⁰ However, because it is his intuition that a minimal state is and ought to be justifiable, he rejects anarchism, and he makes it his task to demonstrate that such a state can indeed be constructed using assumptions and conditions that do not entail the violation of individual rights as he conceives them.¹²¹

One response to Nozick's argument is to treat it as *reductio ad absurdum*. This is, in fact, just the sort of point that Jeremy Bentham made in his famous attack on the theory of natural rights embodied in the *Declaration of the Rights of Man*¹²² made during the French Revolution. Bentham recognized the logical possibility that absolute, negative, extrasocial, individual rights could function to prohibit the enactment of laws designed to bring about communal goals. As he put it:

This nominal universality and real nonentity of right, set up provisionally by nature in default of laws, the French oracle lays hold of, and perpetuates it under the law and in spite of laws

. . . .

It would be not only inconsistent with itself, but inconsistent with the declared and sole object of the declaration, if it did not exclude the interference

Nagel, *Libertarianism Without Foundations*, 85 YALE L.J. 136, 137 (1975) (book review).

¹¹⁹ Nozick would presumably argue that there is no need for social space, in the sense that I am using that term, because private consensual transactions, entered into freely by persons, would be used to satisfy social needs. There are extreme problems with this view, not the least of which is that for people to participate in society on this contract model, they must have ownership of something to trade.

¹²⁰ For a discussion of these same points from the perspective of the moral dynamic involved, see LOREN E. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 4-7 (1987).

¹²¹ Nozick's method for attempting this demonstration is to show how the minimal state can be constructed logically using no assumptions or moves that violate his intuitions about autonomy. Hence, his is an argument based on, and limited to, logical possibility. See NOZICK, *supra* note 4, at 28-53.

¹²² DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (France 1789), reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 8-10 (Ian Brownlie ed., 1971).

of the laws.¹²³

When rights are considered individual, negative, and absolute, they protect persons who possess them from interference by others, regardless of how beneficial that interference might be for the general society.¹²⁴ If members of the American Nazi Party have a right to demonstrate and express their views in the Village of Skokie,¹²⁵ for instance, it does not matter that the more than 40,000 persons of Jewish ancestry who live there will feel threatened.¹²⁶ No interference can deny or disparage the right. If the owners of a Youngstown steel plant want to shut it down, their property right in the factory makes their choice determinative, whether or not the plant closure would financially ruin the community.¹²⁷ Because rights conceived on the libertarian model have this effect, the more rights a person possesses, the bigger the zone of freedom from governmental interference.

It was not only the ability of singular rights claims to block social legislation that bothered Bentham. The *Declaration of the Rights of Man* purported to invoke an open class of unenumerated, inalienable, personal rights prior and superior to any positive laws which might be set out by governments. While a limited number of specific individual rights might be able to coexist with legislation generally intended to promote goals of the social group,¹²⁸ an unknown number of such rights, if given effect, would, in Bentham's view, completely determine the relationship between the individual and the greater society on the model of possessive individualism.¹²⁹ This is the case because,

¹²³ Jeremy Bentham, *Anarchical Fallacies*, in HUMAN RIGHTS 28, 35 (A.I. Meldon ed., 1970).

¹²⁴ The most significant modern statement of these related points is found in Berlin's *Four Essays on Liberty*. ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969); see also Gerald C. MacCallum, Jr., *Negative and Positive Liberty*, 76 PHIL. REV. 312 (1967), reprinted in LIBERTY (David Miller ed., 1991); Charles Taylor, *What's Wrong with Negative Liberty*, in LIBERTY (David Miller ed., 1991).

¹²⁵ See *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

¹²⁶ Much of the current debate over pornography can be seen in these terms as well. See, e.g., Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 300, 305-06 (1989).

¹²⁷ See Local 1330, *United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980).

¹²⁸ Some would argue that so long as the property right is one of those specific individual rights, the development of communitarian values is frustrated. See generally JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990) (discussing how the Framers' understanding of property has limited the potentiality of the Constitution).

¹²⁹ See Bentham, *supra* note 123, at 32-33. Moreover, it was Bentham's point that an

with the invocation of unspecified rights, the domain of personal rights becomes open textured and ceases to have ascertainable bounds. While the cumulation of specified individual rights increases the size of personal space at the expense of social space, it does so, arguably, in an arithmetic fashion. On the other hand, when a generalized reference is made to an open class of so-called natural rights, the process of accretion that is at work when particularized rights are added to each other is entirely superseded and made irrelevant. A conception of individual rights as negative, absolute, presocial, and open textured logically renders the domain of personal rights unbounded. When this is accomplished, it is axiomatic that communal concerns are subject to the veto power of individual members, since no residue of social space exists.¹³⁰ In such a circumstance, communal goals can only be met, if at all, through the process of private consensual arrangements.¹³¹

What liberals like Bentham might take as the stark result of the logic of rights on the individualist model is not thought by libertarians to be a reason to jettison that model at all. For libertarians, the minimal state is a normative ideal, not an absurd result;¹³² the private sphere is to be maximized and the public sphere minimized.¹³³ Because the individual is the primary metaphysical and political unit, autonomy and freedom from restraint are the normative goals.¹³⁴ For the libertarian, it is essential that the individual be afforded the

individualistic approach to rights was ultimately self-contradictory. *Id.* at 34-35.

¹³⁰ It is also true that if individual rights form an infinite and unbounded class, it is inevitable that they will conflict. An additional problem for libertarian theory is that it has not generated any plausible solution to the problem of conflicting rights claims. Bentham saw this as well. See Bentham, *supra* note 123, at 34-35.

In a similar vein, Ian Shapiro claims that the arguments Hobbes makes for rights makes the class of behaviors subject to their application potentially infinite. See IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* 63 (1986). Consider the effect on social space of such an infinite, unbounded class.

¹³¹ Once again, Bentham's description of this effect is instructive:

Unbounded liberty—I must still say unbounded liberty;—for though the next article but one [of the Declaration] returns to the charge, and gives such a definition of liberty as seems intended to set bounds to it, yet in effect the limitation amounts to nothing; and when, as here, no warning is given of any exception in the texture of the general rule, every exception which turns up is, not a confirmation but a contradiction of the rule:—liberty, without any pre-announced or intelligible bounds

Bentham, *supra* note 123, at 35.

¹³² See NOZICK, *supra* note 4, at 333.

¹³³ See BERLIN, *supra* note 124, at 124; see also WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 137-41 (1989).

¹³⁴ This is, in part, due to the connection between anarchism and libertarianism,

maximum possible immunity from control by the state, because only in that context does one obtain autonomy.¹³⁵ According to this view, individual claims to freedom are to have no limit other than the principle that actions can be controlled if and only if they directly and tangibly harm other persons.¹³⁶ The social group has no legitimate interest in the actions, thoughts, values, or even the well-being of the person under libertarian theory. For libertarians, the proper functions of the state are restricted to protection against criminals, defense against foreign aggression, and enforcement of private transactions; the majority may not use the government as its agent to impose value choices on persons to bring about the general well-being of society.¹³⁷

The Ninth Amendment has direct relevance to the possibility of bringing about the libertarian notion of the minimal state. Under one line of interpretation, it authorizes courts to make reference to an unknown number of individual rights, including property and contract rights, to nullify federal and state legislation that conflicts with those rights. It gives the individual a potential judicial veto power over federal and state legislation, whether that legislation is directed to communal goals or not. It provides a means to revive the sort of analysis that occurred in the *Lochner*¹³⁸ era. In fact, libertarians who wish to resurrect the doctrine of substantive economic due process¹³⁹ and breathe life back into the Contract Clause¹⁴⁰ have turned to the Ninth Amendment as a means by which to pour old wine into a new bottle. Due to the logical properties of the Ninth Amendment, it could be an even more

found, for example, in Nozick's work. See NOZICK, *supra* note 4, at xi, 5; see also David Miller, *Introduction to LIBERTY* 3-4 (David Miller ed., 1991); CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY (Zbigniew Pelczynski & John N. Gray eds., 1984).

¹³⁵ See BERLIN, *supra* note 124, at 122-29, 175-206. These claims are relevant as well to the liberal notion of the rational life plan, which requires that people have space—political and psychological—within which to critique their given values in light of their long term and rationally determined life goals. See JOHN RAWLS, *A THEORY OF JUSTICE* 407-16 (1971).

¹³⁶ The clearest and most celebrated statement of this claim is found in J.S. Mill's famous essay, *On Liberty*. See JOHN STUART MILL, *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 65-170 (A.D. Lindsay ed., 1964).

¹³⁷ *Id.* See also HAYEK, *supra* note 52, at 231; NOZICK, *supra* note 4, at ix, ch. 3 *passim*.

¹³⁸ *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952). See also *supra* text accompanying notes 73-86.

¹³⁹ See Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363 *passim* (1990). But see Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 86-90 (questioning the dichotomy between substantive and procedural due process).

¹⁴⁰ See, e.g., Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984).

effective limitation on state power than relics of a prior era.

One commentator has argued that the Ninth Amendment ought to establish a general presumption of individual liberty in constitutional analysis.¹⁴¹ In his view, if that were accomplished "[a]t the national level, the government would bear the burden of showing that its acts were both 'necessary and proper' to accomplish an enumerated function;" at the state level, the government would have the burden of proving that its legislation results from a "necessary exercise of its 'police power.'"¹⁴² Notice the emphasis on necessity in his thesis and the way it conforms to the libertarian conception of the state as minimal. The point is that if the Ninth Amendment incorporates inalienable rights into the Constitution wholesale, the primacy of the individual would be achieved and federal legislation could only be justified by showing that it is essential to the exercise of a specified power.¹⁴³ It would not be enough to

¹⁴¹ As Barnett states, "I suggest that the failure to find a 'general right of freedom' in the Constitution is connected to a general inability to understand the Ninth Amendment's declaration that . . . 'enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" Barnett, *Today's Constitution*, *supra* note 1, at 419 (quoting U.S. CONST. amend. IX). In describing the presumption of liberty that he claims is established by a correct reading of the Ninth Amendment, Barnett explains that "[t]his presumption means that citizens may challenge any government action that restricts their otherwise rightful conduct, and the burden is on the government to show that its action is within its proper powers or scope." *Id.* at 426. In Barnett's view, "every action of government that infringes upon the rightful liberties of the people can be called into question." *Id.* at 432.

For interpretations of the Ninth Amendment that assert its intent was to preserve the rights accorded state citizens as a matter of positive law found in the state constitutions, see Amar, *infra* note 147, at 1199-206. Recently, in a discussion designed to establish a warrant for constitutional amendment outside of Article V, Akhil Amar has argued that the Ninth Amendment refers to the collective right of popular sovereignty, not individual rights of the sort libertarians have in mind. See Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside of Article V*, 94 COLUM. L. REV. (forthcoming 1994) (manuscript on file with the author).

¹⁴² Barnett, *Today's Constitution*, *supra* note 1, at 23-26.

¹⁴³ Of course, many would argue that that is the point of the term "necessary" in the Necessary and Proper Clause. Whether the Necessary and Proper Clause would be given an interpretation restricting the exercise of federal power in close cases or expanding it was one of the major issues faced by the Marshall Court in the early days of the Republic. That the relationship between enumerated federal and implied auxiliary powers would not be one of necessity was established by *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819), which validated the establishment of a national bank as an appropriate exercise of federal power under the Necessary and Proper Clause. As Chief Justice Marshall stated:

Congress is authorized to pass all laws "necessary and proper" to carry into execution the powers conferred on it. These words . . . are probably to be considered as

claim that the Ninth Amendment is broadly referable to a specified power and promotes a desirable social policy goal. Likewise, at the state level, only actions necessary to the police power would sustain scrutiny, and the notion of the police power would be strictly construed. At neither level would a presumption of constitutionality occur or would legislation supported by a majority of the people have any special presumption of validity.¹⁴⁴

The result is a general preference for the individual over the community in conflicts involving the community, not just a warrant for courts to label particular rights as fundamental. My point is that the libertarian interpretation of the Ninth Amendment embodies just this approach; its open-textured invocation of unspecified rights is equivalent to a determination that the individual is metaphysically and morally prior to the social group. As such, the libertarian concept of the Ninth Amendment goes far beyond constituting an authorization for courts to select certain rights for attention and enforcement.¹⁴⁵

synonymous. Necessary powers must here intend such powers as are suitable and fitted to the object; such as are best and most useful in relation to the end proposed. If this be not so, and if [C]ongress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist; at least it would be wholly inadequate to the purposes of its formation.

Id. at 324–25. Barnett's use of the Ninth Amendment would, in essence, reverse this result.

¹⁴⁴ For a discussion of why decisions reflecting majority will ought to have a presumption of validity, see ELAINE SPITZ, *MAJORITY RULE* chs. 8, 10 *passim* (1984). For classical statements on the ethical justification for placing the individual before the group, see generally THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., 1991); JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* (Peter Laslett ed., 1960).

¹⁴⁵ Libertarians claim that the move toward the minimal state made through the Ninth Amendment is nothing to be feared because private consensual transactions could take over the activities of government that citizens really value. In other words, we could privatize. See, e.g., NOZICK, *supra* note 4, at 333–34. See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962) (comprising the most popularly known defense of privatization). But there are serious problems with this approach; it leaves wealth distributions intact, it is insensitive to relative bargaining power, it ignores the impact of racism and sexism on fair market arrangements, and it minimizes the possibility that there are projects worth undertaking that are beyond the resources of private industry or that do not generate enough short term profit to attract investors. See WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 95, 107–15, 121, 146–47, 150–52, 155 (1990) (cataloging various criticisms of the libertarian position).

Libertarians might also suggest that the delegated powers of the federal government or the police powers of state government are generous enough to support whatever legislation the majority wants on a particular question, even in the face of the Ninth Amendment, because it only shifts the burden of proof in favor of liberty. See generally Barnett, *Today's Constitution*, *supra* note 1. This claim is problematic because it already assumes the limitation of appropriate ends to a determinate set established at the founding of our nation and prevents the social group from changing or adding to those ends, except through the

There have been two responses to the libertarian interpretation of the Ninth Amendment that can be broadly referred to communitarianism. One is the claim that the Amendment is too ambiguous to be enforced. This is Judge Bork's inkblot approach.¹⁴⁶ The other response is to assert that the libertarian reading of the Ninth Amendment is an anachronism because, at the time of the founding of our nation, the modern vision of autonomy was not fully developed; hence, the rights referred to by the Framers were those rights declared by and afforded to citizens by the various state constitutions.¹⁴⁷ During the Revolutionary era people were accustomed to treating the states as sources of collective and structural protection against the tyranny of the British Crown and they had mixed and developing attitudes toward the capacity of individual rights to accomplish the same job in response to a new federal government.¹⁴⁸ Hence, these interpretations support the notion that if the Supreme Court were to use the Ninth Amendment to decide cases today, it ought to treat the amendment as a conduit of state prerogatives, not individual rights.

However, what is important to note about many of the participants in the debate over the Ninth Amendment beyond the particular political position that each represents is that the Framers' intent is treated as efficacious to a resolution of the Amendment's controversy. But even if that intent could be discovered, there are very serious problems with using it to determine hotly contested constitutional questions, not the least of which is the theoretical inquiry as to why the desires of a small, unrepresentative, but historically symbolic group should matter more than the desires of our modern society. Quite simply, there is no historical consensus on the meaning of the Ninth Amendment that can be employed to determine its use today. As I will show below, this is true in large part because the Bill of Rights itself was the result of a classic political compromise between factions with complex, conflicting, and shifting attitudes toward liberty and community.¹⁴⁹

IV. FRAMERS' INTENT AND CONFUSION OVER IDEALS

To avoid the problem of judicial activism presented by the Ninth

process of amendment, which is problematic in itself.

¹⁴⁶ See 14 HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1987; Robert H. Bork 249 (Wm. S. Hein & Co. 1990).

¹⁴⁷ See McAfee, *supra* note 1, at 1218, 1238; see also Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1136, 1177, 1199-206 (1991).

¹⁴⁸ See, e.g., Amar, *supra* note 147.

¹⁴⁹ See *infra* text accompanying notes 211-17.

Amendment, both libertarians and communitarians refer to the Framers' intent to support their competing interpretations.¹⁵⁰ This strategy assumes that there was consensus on the question of unenumerated rights that can be clearly determined.¹⁵¹ There is no reason to believe, however, that such a consensus existed or that, if it did, we might be able to determine what it was.

The Bill of Rights, of which the Ninth Amendment is a part, was a product of the struggle between Anti-Federalists and Federalists over the ratification of the Constitution.¹⁵² As a result, any discernment of its nature, meaning, and significance requires a constitutional jurisprudence embracing both Anti-Federalist and Federalist understandings of its key political concepts.¹⁵³ An appreciation of the role of the Anti-Federalists can be linked to a renewed interest in that group sparked by the seminal work of Gordon Wood which appeared in the 1960s and caused a sea change in the historiography and general understanding of the American Revolutionary period.¹⁵⁴ In particular, Wood's work contributed to a better understanding of the attitude of the Anti-Federalists to liberty and community.¹⁵⁵ Still, adequately characterizing the beliefs of both camps respecting each ideal is difficult because neither the Anti-Federalists nor the Federalists represented cohesive and well-understood political philosophies at the level of theory or practice.¹⁵⁶

Nonetheless, those who want to use the Ninth Amendment as a general source of unspecified rights often refer to the adoption of the Bill of Rights, briefly sketching the arguments made by various Framers for and against

¹⁵⁰ See, e.g., Barnett, *Today's Constitution*, *supra* note 1, at 423–26.

¹⁵¹ It also ignores the theoretical problems associated with originalism. In that regard, see generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). But see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988) (arguing that it is possible and justifiable to have an originalist approach to constitutional interpretation).

¹⁵² See ROBERT A. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776–1791* at 127–89 (1983).

¹⁵³ For a significant contribution to the development of such a jurisprudence, see *Symposium, Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 NW. U. L. REV. 1 (1989), which is concerned primarily with various analyses of Anti-Federalist politics and thought.

¹⁵⁴ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 passim* (1969). I borrow heavily from Wood and other revisionist historians in this portion of the Article.

¹⁵⁵ See Wilson C. McWilliams, *The Anti-Federalists, Representation, and Party*, 84 NW. U. L. REV. 12, 13–26 (1989).

¹⁵⁶ See Joyce Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. (3d ser.) 20, 20–21 (1986).

enumeration in the context of a government of limited, delegated powers. They typically recount the well-known Federalist argument that, because the federal government was one of delegated powers only, the national authorities would simply not have the capacity to infringe rights.¹⁵⁷ Hence, an enumeration of particular rights in a bill would not only be unnecessary, but could be dangerous because it might confuse the question of the scope of the delegation. It is part of my claim that this argument was, in some sense, insincere; it was made primarily to repudiate attempts by the Anti-Federalists to cabin the powers of the federal government.

Libertarian proponents of the Ninth Amendment typically ignore the role of the Anti-Federalists in the ultimate adoption of the Bill of Rights and compound the errors created by such a one-sided view of history by presenting the political theory of the Federalists as unified, fully developed, easily identifiable, and overwhelmingly Lockean.¹⁵⁸ The truth of the matter is that there were many areas of doctrinal overlap between Federalists and Anti-Federalists.¹⁵⁹ There were reactionary and democratic elements in both camps¹⁶⁰ and important political notions now often identified with each group—civic republicanism in the case of Anti-Federalists and pluralism promoted by a strong central government in the case of Federalists—involved developing, contested, and ambiguous concepts.¹⁶¹

The difference between the Anti-Federalists and the Federalists has been described by use of numerous dichotomies: civic republicanism vs. liberalism,¹⁶² localism vs. centrism,¹⁶³ populism vs. elitism,¹⁶⁴ agrarianism vs.

¹⁵⁷ See McWilliams, *supra* note 155.

¹⁵⁸ See, e.g., Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment* (1968), in *RIGHTS RETAINED*, *supra* note 1, at 161–62. In contrast, for an analysis of the meaning of the Ninth Amendment that characterizes it as a reference to the rights guaranteed by the states, see Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983), reprinted in *RIGHTS RETAINED*, *supra* note 1, at 243.

¹⁵⁹ See Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 83 (1989).

¹⁶⁰ See *id.* at 83–84; see also WOOD, *supra* note 154, at 492–99.

¹⁶¹ See Daniel W. Howe, *Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding*, 84 NW. U. L. REV. 1, 1–3 (1989); cf. EDWARD M. BURNS, JAMES MADISON: PHILOSOPHER OF THE CONSTITUTION 28–30 (1968).

¹⁶² This is the point of the debate between Appleby and Kramnick on the one hand and Banning and Pocock on the other. See generally Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New America Republic*, 43 WM. & MARY Q. (3d ser.) 3 (1986).

¹⁶³ This is the thesis of the Rose piece. See Rose, *supra* note 159, at 89–93.

¹⁶⁴ Wood makes much of this difference. See WOOD, *supra* note 154, at 483–99.

mercantilism,¹⁶⁵ organicity vs. autonomy,¹⁶⁶ sympathy vs. rationality,¹⁶⁷ conventionalism vs. objectivism,¹⁶⁸ and so on. To the extent that either group can be usefully characterized by way of simplifying paradigms, probably the best set is civic republicanism vs. liberalism.¹⁶⁹ Neither of these labels is wholly accurate and both invite a de-emphasis of differences within each camp that is troubling.¹⁷⁰ Nonetheless, I will use these labels, relating them to the norms of liberty and community that I have been discussing in order to show just how misguided is the attempt to define the Framers' view on unenumerated rights. This scenario emerges from a discussion of a number of factors that further complicates the search for a consensus on the Ninth Amendment and the Bill of Rights of which the Ninth Amendment is a part.

A. *Anachronism, Eclecticism, and Ambivalence*

Any attempt to relate the beliefs and attitudes of the Framers to modern political conceptions runs up against the problem of anachronism. Modern views of liberty and community with which we are familiar had simply not fully developed by the time of the Revolutionary era.¹⁷¹ The twentieth century understanding of rights as wholly individual had not become ascendant during the eighteenth century, notwithstanding the works of Locke and Hobbes.¹⁷² Similarly, the individualistic conception of liberty as freedom from restraint had not gained clear dominance over the more communitarian conception of liberty as freedom to participate in the public life of the polity.¹⁷³ Hence, political notions that we now consider fundamental were, at the founding of our

¹⁶⁵ See JACKSON T. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788* at 98-102 (1961).

¹⁶⁶ But see WOOD, *supra* note 154, at 499, for the claim that although both Federalists and Anti-Federalists adhered to the notion of society on an organic model each gave that model a different interpretation.

¹⁶⁷ See McWilliams, *supra* note 155, at 27; see also WOOD, *supra* note 154, at 491.

¹⁶⁸ See McWilliams, *supra* note 155, at 15.

¹⁶⁹ These two categories are the broadest and include elements of all the categories. Moreover, they are the most flexible. For a general discussion of which label most accurately fits Thomas Jefferson, for instance, see Appleby, *supra* note 156, at 24-25. See generally BANNING, *infra* note 192, *passim*.

¹⁷⁰ See Rose, *supra* note 159, at 83-84.

¹⁷¹ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 183-89 (1967); WOOD, *supra* note 154, at 293-94; Rose, *supra* note 159, at 77-82.

¹⁷² Ian Shapiro classifies the works of Locke and Hobbes as "early" arguments for rights. See SHAPIRO, *supra* note 130, at 23-148 see generally FREEDEN, *supra* note 117, at 12-23. There was considerable confusion, as well, over whether the rights enjoyed by Americans were natural or positive. See BAILYN, *supra* note 171, at 183-89, 193-94.

¹⁷³ See WOOD, *supra* note 154, at 24-25, 60-63.

nation, more nascent than overt. This is especially true of the developing conceptions of individual rights and the public good.¹⁷⁴ Due to the embryonic nature of many key political ideas, especially those concerned with the relation of the individual to the community, it is not surprising that a theoretical conflict between them was not fully appreciated by the Framers and so was not resolved in any intentional way in the drafting of the Constitution. As a result, attempts to identify a clear consensus on the meaning of the Ninth Amendment that involve imposing modern views about rights or community are suspect.

Moreover, the problem of anachronism is exacerbated by the highly eclectic nature of the sources of Revolutionary political ideology. American political theorists borrowed instrumentally from a very wide variety of thinkers with no concern for theoretical consistency between them.¹⁷⁵ They were able to do this, in part, because the object of their discontent was the relationship of the British Crown to the American polity, not the problem of the manner in which the individual citizen related to the social group in the abstract.¹⁷⁶ As a result, Aristotle, Machiavelli, Harrington, and Rousseau were just as much intellectual forbearers of the American Revolution as were Grotius, Pufendorf, Hobbes, and Locke.¹⁷⁷ Not surprisingly, political values during the Revolutionary period were as many and varied as their sources, and individual theorists were often confused over difficult questions about the person and the society implicated by the Ninth Amendment.¹⁷⁸

Perhaps another reason why eclecticism abounded during the Revolutionary era was the ambivalence of many toward the emerging dual values of liberty and community.¹⁷⁹ In the heady years leading up to the Declaration of Independence and the Articles of Confederation, it was the liberty of the American people as a *whole* that was sought,¹⁸⁰ and, as a result, conceptions of liberty were given a collectivist spin.¹⁸¹ Individuals believed that they would free themselves while freeing their society, and that by so doing they could create personal opportunities for success and upward mobility by promoting a general society that valued personal merit and public service over inherited privilege.¹⁸² Hence, participants in the American Revolution felt

¹⁷⁴ See BAILYN, *supra* note 171, at 183-89, 193-98; WOOD, *supra* note 154, at 293-94; McWilliams, *supra* note 155, at 19-21.

¹⁷⁵ See BAILYN, *supra* note 171, at 23-54; see also FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 58-87 (1985).

¹⁷⁶ See WOOD, *supra* note 154, at 31-45.

¹⁷⁷ See, e.g., BAILYN, *supra* note 171, at 23, 27.

¹⁷⁸ See Banning, *supra* note 162, at 12.

¹⁷⁹ See *id.* at 8, 11-12.

¹⁸⁰ See WOOD, *supra* note 154, at 18-45.

¹⁸¹ *Id.* at 24-25, 61.

¹⁸² See *id.* at 75-82.

drawn both by liberty and by community and often attempted to resolve any tension between the two concepts by reference to a definition of public liberty that attempted to combine aspects of both.¹⁸³ It is true that in the period between the Articles of Confederation and the Constitutional Convention the threat from Britain ceased to provide external pressure for cohesion, and harsh economic times and pressures to further democratize put stress on the polity.¹⁸⁴ As a result, individuals tended to gravitate to one or the other value.¹⁸⁵ Nonetheless, very few completely preferred one norm over the other, and an attraction to individual liberty *and* civic virtue very often occurred in the same heart and mind.¹⁸⁶

Finally, even if anachronism, eclecticism, and ambivalence were not obstacles to locating consensus on the question of unenumerated rights, the fact that the Bill of Rights was born of a classic political compromise is such an obstacle.¹⁸⁷ The Bill of Rights represents such a complex compromise that identifying the “winner’s” version of rights is difficult, if not impossible. Again, as I will show, those Framers who gravitated toward the norm of individual rights resisted the idea of a bill of rights, while those who retained a preference for local community tried strategically to use a bill of rights to block a strongly nationalist constitution. The groups involved in the compromise, of course, were the Federalists and the Anti-Federalists.

B. *The Struggle over the Constitution*

As I have indicated, the period leading to the Declaration of Independence and the Articles of Confederation was one of optimism and cohesion more than pessimism and divisiveness.¹⁸⁸ To be sure, there were disagreements between American political theorists over all of the main questions of the day¹⁸⁹—issues of representation, consent, constitutionalism, rights, and sovereignty.¹⁹⁰ It was not until the period after the Revolution, when the economic effects of the struggle came home to roost and the absence of the British Crown as a target of generalized hostility became a factor, that the American polity was confronted with the conflicts and tensions latent in American society.¹⁹¹

¹⁸³ *Id.* at 61–62.

¹⁸⁴ See generally RUTLAND, *supra* note 152, at 106–25.

¹⁸⁵ See BANNING, *infra* note 192, *passim*.

¹⁸⁶ *Id.*; see also BURNS, *supra* note 161, at vii; McWilliams, *supra* note 155, at 21–22.

¹⁸⁷ See RUTLAND, *supra* note 152, at 159–89.

¹⁸⁸ See WOOD, *supra* note 154, at 75–83.

¹⁸⁹ *Id.* at 83–90.

¹⁹⁰ See BAILYN, *supra* note 171, at 198.

¹⁹¹ See WOOD, *supra* note 154, at 393–467.

By 1787, many of the players in the Revolutionary drama concluded that the Articles of Confederation were a failure.¹⁹² Governance under the Confederation had proceeded on the assumption that the states functioned as independent sovereigns, and accordingly, the scope of political community could be no broader than the individual state.¹⁹³ What was not agreed upon in the period leading up to the Constitutional Convention was the degree to which this prior understanding ought to be abandoned.¹⁹⁴ The move toward centrism that occurred during the Constitutional Convention surfaced after a series of attempts to reform the various state governments proved ineffective to achieve the goals of the embryonic Federalists among Revolutionary era politicians.¹⁹⁵ Just what were those goals and the problems that generated them?

Following the Revolution, a number of factors intersected that eventually caused many to jettison civic republicanism for a form of interest politics.¹⁹⁶ A process of fractionalization in the American polity ensued in which regional, economic, class, and cultural interests often appeared to conflict.¹⁹⁷ In addition, pressures to further democratize society came to the fore—most significantly in the formation of localized political majorities often opposed to more national economic interests.¹⁹⁸ It is perhaps not inaccurate to say that majoritarianism combined with a more populist form of civic republicanism in the states. Nor is it inaccurate to say that majoritarianism opposed what was often perceived as hierarchical, elitist, and exclusionist forms of civic republicanism purveyed by the “well bred” and “well read” gentlemen who had been ascendant during the era of the Revolutionary War.¹⁹⁹ This opposition often appeared in connection with laws passed by many states that denied or revised the property and contract rights of creditors to give relief to debtors.²⁰⁰

¹⁹² See LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 89–90 (1978); MAIN, *supra* note 165, at 113. Burns’s work provides a good discussion of Madison’s views on this topic. See BURNS, *supra* note 161, at 102.

¹⁹³ See MAIN, *supra* note 165, at 15–17.

¹⁹⁴ *Id.* at 113–17.

¹⁹⁵ See WOOD, *supra* note 154, at 463.

¹⁹⁶ For a discussion of this shift in terms of the emergence of a tension between rights of persons, rights of property, and the right to be governed only by laws to which members of the polity consent, see NEDELSKY, *supra* note 128, at 2–9.

¹⁹⁷ See generally *id.*, at 141–49; WOOD, *supra* note 154, at 393–429.

¹⁹⁸ See BURNS, *supra* note 161, at 36–41.

¹⁹⁹ See WOOD, *supra* note 154, at 7.

²⁰⁰ It was a central theme of Charles Beard’s classic work on the Constitution that a more national form of government was sought to remedy the economic ills fostered by the Articles of Confederation, one of which included state laws passed to provide relief to debtors to the detriment of vested contract and property interests. See generally BEARD, *infra* note 224. Forrest McDonald argues that the issues relating to debt relief were more complex and more tangentially related to the motives for a new Constitution than as Beard

Constant wrangling between states as to how to conduct trade across borders was also a disincentive to economic growth motivating persons to look to a stronger central government.²⁰¹ It was thought by many who later took up the Federalist cause that a strong national government would blunt the ability of localized political majorities to impair the rights of the propertied class, would generally promote economic growth, and would impair the negative effects thought to flow from too much democracy.²⁰² They saw a revision of the very structure of the government on the model of a federal union with a strong national center of gravity as the first and most effective action that could be taken.²⁰³ These views signaled that many had given up on the civic republican image of a cohesive citizenry dedicated to the public good.

The Federalist cause was to become generally associated in the annals of history with a pluralistic vision of society²⁰⁴ leading to interest group politics, while the Anti-Federalists were to be described as having continued the tradition of civic republicanism, albeit modified by an almost anti-intellectual populism operating at the level of local communities.²⁰⁵ Thus, while there is some usefulness to identifying Federalism with an emerging liberalism and Anti-Federalism with civic republicanism, these groups still did not adhere to easily identifiable, mutually exclusive political categories.²⁰⁶ After all, both

described. See McDONALD, *infra* note 224, at 242, 388–91.

²⁰¹ See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 25 (1990).

²⁰² See MAIN, *supra* note 165, at 105; see also WOOD, *supra* note 154, at 403–09.

²⁰³ See WOOD, *supra* note 154, at 463.

²⁰⁴ See Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39, 55 (1990); see also ISAAC KRAMNICK, *REPUBLICANISM AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH-CENTURY ENGLAND AND AMERICA* 266 (1990).

²⁰⁵ See KRAMNICK, *supra* note 204, at 266–67. For a description of the Federalist characterization of the Anti-Federalists, see WOOD, *supra* note 154, at 494–96.

²⁰⁶ Even Joyce Appleby, who has insisted on emphasizing what she takes to be the classic liberalism in the thinking of Jefferson, still concedes that it is difficult to identify neatly opposed ideological camps among the actors in the revolutionary drama. As she has stated:

Ideologies in such societies [of Revolutionary America] rarely enjoy an uncontested supremacy—which is why we often refer to them as persuasions

. . . .

A collective case of cognitive dissonance produces a collective effort to accommodate the non-conforming evidence. Within each person rage[s] the battles generated by the ideological contradictions of the whole.

Appleby, *supra* note 156, at 28–29.

sides began with an enthusiasm for the civic republican tradition.²⁰⁷ Aspects of civic republicanism continued in Federalist thought, just as frequent reference to the rhetoric of rights found its way into Anti-Federalist critiques of the nationalist Constitution.²⁰⁸ Certainly, the Federalist position from today's perspective would more accurately be described as constituting an emerging form of liberalism rather than pure libertarianism for the simple reason that the minimal state was not what Federalist thinkers had in mind to solve the problems they perceived as stemming from the Articles of Confederation.²⁰⁹ Federalists were perfectly willing to curtail the freedom of individuals in order to promote what they took to be the national interest²¹⁰—that is how they understood their structural attack on state sovereignty. The general socio-political context of the Constitutional Convention, therefore, was not one that could be expected to produce a resolution of the claims of individualism versus communitarianism. As I will show, the specific events leading to the compromise of the Bill of Rights also could not be expected to produce such a resolution.

C. *Constitutional Compromise and the Bill of Rights*

When it became clear during the course of the Constitutional Convention that the Virginia Plan, a Federalist proposal, had gained momentum, Anti-Federalists such as George Mason began to employ a number of strategies to derail the Federalist train.²¹¹ One of these strategies was to offer a series of piecemeal revisions during the time the Constitution was being shaped that focused on the issue of personal rights.²¹² This attack was unavailing. In the last week of deliberation, Mason asked that a formal bill of rights be made a part of the Constitution itself and moved that a bill of rights committee be appointed.²¹³ This suggestion was rejected.²¹⁴ Thereafter, Mason once again

²⁰⁷ See generally McDONALD, *supra* note 175, at 185–224; WOOD, *supra* note 154, at 46–91.

²⁰⁸ See KRAMNICK, *supra* note 204, at 270–71.

²⁰⁹ See BURNS, *supra* note 161, at 34–35, 43–44.

²¹⁰ See *id.* at 33, 71.

²¹¹ This momentum became apparent when the New Jersey Plan was rejected. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 321–22 (Max Farrand ed., 1966) [hereinafter THE RECORDS]. On June 20, the day after the New Jersey Plan was defeated, Mason stated that “he never would agree to abolish the State [governments] or render them absolutely insignificant.” *Id.* at 340. See generally RUTLAND, *supra* note 152, at 110–25 (describing the Anti-Federalist strategy for defeating a strongly nationalist version of the new Constitution).

²¹² RUTLAND, *supra* note 152, at 114.

²¹³ *Id.* at 116.

tried to inject various rights provisions into the emerging document by suggesting piecemeal changes.²¹⁵ Still this strategy did not work. As a last attempt, Mason and his followers asked for a second constitutional convention.²¹⁶ This too proved unavailing, but after the dust settled and the work of the Convention was made public, Anti-Federalists and Federalists alike discovered that the absence of a bill of rights worried the citizenry and proved a threat to ratification.²¹⁷ The net result of these events is a seeming paradox.

The civic-republican, proto-communitarian Anti-Federalists, who ought to have been opposed in principle to the policy of interposing rights between the individual and community, were the very source for the impetus to the Bill of Rights itself. The fact of the matter is that Anti-Federalists were content to rely on the specification of rights through the law of the states²¹⁸ until it was clear that the basic structure of federal/state relations would limit the principle of state sovereignty under the new Constitution.²¹⁹ Then and only then did they take up the standard of the Bill of Rights. Their concern for a bill of rights was in inverse proportion to the success of the Federalist scheme.²²⁰ This was the case because the cornerstone of the Anti-Federalist brand of civic republicanism was state sovereignty.²²¹

The Anti-Federalists were adherents of the view that democracy works

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 117-18.

²¹⁷ *Id.* at 124-25. While the call for a bill of rights did not function as a killer amendment during the Convention, it did prove to capture the popular imagination in a way that was not anticipated by any of the Framers, even the Anti-Federalists. *See generally id.* at 119-89.

²¹⁸ The idea was that the states were to be the guarantors of civil rights. It is interesting to note that they functioned in just this way during the period of the Alien and Sedition Acts. For example, Virginia and Kentucky asserted by resolution the claim that because the Acts violated the Constitution they could not be imposed on the states. *See* JAMES MACGREGOR BURNS, *COBBLESTONE DEMOCRACY* 21 (1990). For a discussion of whether protections against oppression emanate from the states or the federal government, *see generally* Gregory H. Williams, *Where is Freedom: Federal or State Constitutions?*, 30 *How. L.J.* 799 (1987).

²¹⁹ *See generally* BURNS, *supra* note 218.

²²⁰ Consistent with my thesis, the attitude of Anti-Federalists toward the notion of a bill of rights was instrumental. Insofar as the absence of a bill of rights might prove a defect in the proposed Constitution capable of preventing its ratification, Anti-Federalists were quick to point out its absence. When Madison co-opted this issue and indicated his willingness to push for a formal bill of rights after ratification, Anti-Federalists lost much of their enthusiasm for the notion. *See id.*; *see also* Paul Finkleman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 *SUP. CT. REV.* 301, 303.

²²¹ *See* RUTLAND, *supra* note 152, at 109-11.

well only when it is decentralized—that “the people” can only function democratically when they are from a similar geographic, ethnic, and religious background and the polity itself is not too large.²²² They worried that a strong national government, removed from those who elected it, would be transformed into an oligarchy.²²³ Fear of the oligarchic tendencies of a strong federal government was not Anti-Federalist paranoid fantasy. The Framers, in fact, comprised just such an educational and economic elite.²²⁴ The Constitutional Convention itself was conducted under conditions that evinced distrust of public sentiment because its proceedings were secret.²²⁵ In this context, the Anti-Federalists perceived the Federalist push for a strong national government as a structural attack on what they considered to be the principle of

²²² See *Brutus I*, in *FEDERALISTS AND ANTI-FEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION* 9–13 (John P. Kaminski & Richard Leffler eds., 1989).

²²³ As George Mason put it in referring to the Senate to be established by the new Constitution:

These with their other great Powers . . . their Influence upon and Connection with the supreme Executive from these Causes, their Duration of Office, and their being a constant existing Body almost continually sitting, joined with their being one compl[ete] Branch of the Legislature, will destroy any Balance in the Government, and enable them to accomplish what Usurpations they please upon the Rights and Libertys [sic] of the People.

George Mason’s Objections to the Constitution of Government Formed by the Convention (1787), in *2 THE COMPLETE ANTI-FEDERALIST* 11 (Herbert J. Storing ed., 1981).

²²⁴ As Wood said, the Framers were “well bred, well fed, well read and well wed.” WOOD, *supra* note 154, at 7. For a discussion of the socio-economic background of the Framers, see MAIN, *supra* note 165, at 1–20, app. E. The most controversial attempt to analyze attitudes toward the proposed Constitution on economic lines is, of course, the work of Charles Beard. See CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 19–51, 73–151, 253–91 (1935). Beard’s work was once thought discredited. See, e.g., FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1992). Nonetheless, there has been a recent revival of interest in his central thesis. See Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4 (1987).

²²⁵ See FARBER & SHERRY, *supra* note 201, at 27. Due to the secrecy surrounding the Convention, the documentary evidence of its proceedings comes from a variety of sources and has been difficult to organize and substantiate. The Secretary of the Convention took minutes of the deliberations for preparation of an official journal to be delivered to President Washington. These minutes were disorganized and incomplete. As a result, the private notes of various attendees became essentially important in the reconstruction of the proceedings. By far the most important of these were Madison’s notes. The journal itself was not officially published until 1818. See *THE RECORDS*, *supra* note 211, at xi–xix.

state sovereignty.²²⁶ They reacted accordingly.²²⁷

If the proto-communitarians in this drama turned out to be the Anti-Federalists, who paradoxically began the quest for the Bill of Rights, any libertarian rights theorists were to be found among the Federalists. There was a strong antimajoritarian faction among them, persons who had distrust, if not outright distaste, for democratic government.²²⁸ Moreover, the right that many Federalists were most interested in vindicating was the property right.²²⁹ As a result, the Federalists were not interested in having the effectiveness of their strategy blunted by limitations on the powers of the federal government through a bill of rights. Accordingly, the Federalists did not warm to the notion of the Bill of Rights until it appeared that the Anti-Federalists might be able to drive a wedge between the states if the Bill was not adopted.²³⁰

What is the significance of this state of affairs for current disputes over the nature and effect of the Ninth Amendment? Simply put, the requirements of pragmatic politics prevented both sides—Federalists and Anti-Federalists—from

²²⁶ See MAIN, *supra* note 165, at 120–24.

²²⁷ The reaction was the attempt to prevent ratification. See FARBER & SHERRY, *supra* note 201, at 175–81.

²²⁸ Alexander Hamilton, of course, is most associated with these attitudes. See, e.g., THE RECORDS, *supra* note 211, at 298–99. For many of the Federalists, this distaste developed from a dual process of democratization and disillusionment that occurred in the period between establishment of the Articles of Confederation and the Constitutional Convention. See WOOD, *supra* note 154, at 471–84.

²²⁹ The attitude of the Federalists was extremely complex. One commentator, for instance, objects to characterizations of the Federalist concern for property as too focused on economic self-interest and not concerned enough with the larger picture of “the structure of ideas and institutions.” See NEDELSKY, *supra* note 128, at 2. For a discussion of Madison’s complex views on property and their connection with his philosophy of mind, see DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 72–81 (1984). In this context, the role of Shay’s Rebellion in bringing about the impetus for a constitutional convention should not be forgotten. Shay’s Rebellion was an insurrection fomented by economically distressed farmers in western Massachusetts who rebelled in order to attempt to secure court reform and debt relief. Influential property owners and creditors feared harm to their interests caused by such outbreaks and characterized the event as evidence of the negative effects of too much democracy. It is not a coincidence that the Constitutional Convention took place in 1787, one year after the Rebellion and subsequent to the economic depression that gave rise to it. See FARBER & SHERRY, *supra* note 201, at 16–17; see also MAIN, *supra* note 165, at 61–64.

²³⁰ Madison was the Federalist who appreciated the practical requirement to tolerate a bill of rights. The absence of such a bill of rights might have proved fatal to ratification of the Constitution in Virginia and New York if the Federalists had not agreed to seek amendment of the Constitution to add a bill of rights after ratification. See RUTLAND, *supra* note 152, at 159–89; see also Finkleman, *supra* note 220, at 302–03 (discussing Madison’s reservations).

being able to pursue their political ideals directly and purely. In the context of the adoption of the Bill of Rights, the rights theorists were in some sense opposed to a broad grant of rights in the Constitution, and the civic republicans found themselves in the odd position of resorting to the notion of rights in order to blunt the development of oligarchy at the federal level. What, then, is the real possibility that reference to the Framers' intent could ever settle the controversy over the Ninth Amendment?

As the works of constitutional scholars like Akhil Amar and Thomas McAfee show, there is just as much reason to believe that the Framers thought the rights referred to in the Ninth Amendment were collective rights, and particularly those rights accorded to persons by the positive law of the states, not some unspecified list of natural law rights existing independently of government.²³¹ This interpretation is just as consistent with the plain language of the Ninth Amendment as is the natural rights interpretation; moreover, it conforms to the Anti-Federalist motivation to limit federal power by reference to state sovereignty. What is not enough appreciated in the analysis of the general scenario surrounding the Ninth Amendment is that, as a matter of pragmatic politics, the Federalists had no motivation to limit the power of the federal government *either* by an incorporation of state positive law *or* an open-textured invocation of rights through the Ninth Amendment. What is not enough realized is that ambiguity over the source of the rights referred to in the Ninth Amendment allowed the Federalists to respond to Anti-Federalist concerns about the act of enumeration, without having to concede directly to a known limitation on federal power. It is within this general context of political compromise that the interpretative controversy over the Ninth Amendment must be placed. When the Ninth Amendment is viewed against this backdrop, arguments for a definitive resolution of its approach to rights based on the Framers' intent are completely unconvincing.

²³¹See, e.g., Amar, *supra* note 147, at 1134, 1199-1206; McAfee, *supra* note 1, at 1240-42; see also Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1440-41 (1987); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside of Article V*, 55 U. CHI. L. REV. 1043, 1043-76 (1988); Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis*, 61 U. CIN. L. REV. 107, 149-64 (1992).

Calvin Massey makes the startling argument that the Ninth Amendment actually functions to federalize personal liberties secured by the state constitutions. See Massey, *Anti-Federalist Ninth Amendment*, *supra* note 1, at 1232; see also Massey, *Natural Law Component*, *supra* note 1, at 322-23 (arguing that the Ninth Amendment was meant to incorporate two types of rights, both positive rights found in state law as well as natural rights, stemming from notions of the rights of man independent of government).

V. THE NINTH AMENDMENT: THE PERSON AND SOCIETY RECONCEIVED

If the Ninth Amendment should not be used to bring about the minimal state, *should* it be used at all? If so, how? It is here that the promise of a coherent fundamental rights jurisprudence asserts itself. Like substantive due process and related principles and provisions, the Ninth Amendment has been a “jumping off” point for the Supreme Court’s fundamental rights decisions. Those decisions are severely hampered, however, by the limitations of the liberty/community dichotomy and the way it is easily manipulated to promote the interests of dominant political groups. Hence, no coherent vision of fundamental rights *is* possible unless and until that dichotomy is cast off and replaced by a reconception of the person and of the community. Thus, a meaningful Ninth Amendment jurisprudence, developed on a case-by-case basis, is dependent on the evolution of a meaningful fundamental rights jurisprudence, developed on a case-by-case basis. That evolution can only begin to emerge if our courts frankly address the following sorts of questions: What is a flourishing human being? What is a good society? How are both dependent on each other?

In the past, the liberty/community polarity afforded no opportunity to consider such explicit questions. In closing, I will outline three emerging political theories that approach social/political questions without relying on a false antinomy between liberty and community. These theories are modern pragmatism, Aristotelian social democracy, and liberal communitarianism. They converge to provide a pragmatic methodological stance, informed by a real interest in full human potential that is supported by a conception of rights founded in political participation. As promising as they are, however, they constitute only a beginning. None of them speaks eloquently enough to the problems created by the disparity in political power in our society. Thus, my arguments based on these theories are programmatic. Nonetheless, they offer an inkling of more promising paths to a workable and dynamic understanding of fundamental rights, in large part because they abandon the normative dualism of liberty and community.

A. Modern Pragmatism

In the last decade, some legal scholars and political philosophers have turned to pragmatism as a possible source for political analysis and critique that avoids both foundationalism and skepticism.²³² Pragmatism is, of course,

²³² One legal scholar closely associated with the revival of pragmatism is Margaret J. Radin who has utilized it as a particularly fruitful source for feminist theory. *See generally*

associated with the works of C.S. Pierce, William James, and John Dewey.²³³ Pragmatism is a difficult philosophical stance to describe, either in its original form or in its new incarnation, primarily because it is associated with a particularly jaundiced view of grand theory.²³⁴ Moreover, the very notion of searching for defining characteristics of the new pragmatism is antithetical to what pragmatism is about. Further, what *can* be meaningfully said about it is contested.²³⁵

Nonetheless, there are a number of commitments that contemporary

Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990) [hereinafter Radin, *Pragmatist*]. Frank Michelman's work is also influenced by pragmatism. See, e.g., Margaret J. Radin & Frank I. Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991). But see Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347 (1993) (for a critically objective analysis of Radin's views).

Richard Rorty is the neo-pragmatic philosopher whose work has most influenced contemporary philosophy. See generally RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) [hereinafter RORTY, *MIRROR*]; Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811 (1990).

²³³ Pragmatism was first developed by C.S. Pierce in the 1870s in connection with his attempts to formulate a theory of meaning in the context of logical method. See EDWARD C. MOORE, *AMERICAN PRAGMATISM: PIERCE, JAMES, AND DEWEY* 1, 25-42 (1961). William James was both a philosopher and psychologist who understood pragmatism as an epistemological theory which stressed the relevance of experience. *Id.* at 135-52. John Dewey developed pragmatic approaches to social and political questions and was particularly interested in the phenomenon of intelligence. *Id.* at 242-59. James's work had significant impact on psychology, while Dewey's work was the impetus to a modern theory of education. To some extent, pragmatism's creation and growth as a philosophic movement was cooperative, coming from the deliberations and activities of the Metaphysical Club founded by Pierce and James. ISRAEL SCHEFFLER, *FOUR PRAGMATISTS* 14-15 (1974). For further discussion of the works of Pierce, James, and Dewey see generally CHARLES MORRIS, *THE PRAGMATIC MOVEMENT IN AMERICAN PHILOSOPHY* (1970); *Pragmatism*, in 6 *ENCYCLOPEDIA OF PHILOSOPHY* (Paul Edwards ed., 1967).

²³⁴ Pragmatism is particularly critical of the Cartesian tradition's search for foundations and its assimilation of human knowledge to the deductive mathematical model. As Pierce stated in his famous essay, *How to Make Our Ideas Clear*, "The opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth" Charles S. Pierce, *How to Make Our Ideas Clear*, in *PRAGMATIC PHILOSOPHY: AN ANTHOLOGY* 12, 17 (Amelie Rorty ed., 1988). Modern pragmatism is especially disparaging of abstraction. See RORTY, *MIRROR*, *supra* note 232, at 3-13.

²³⁵ See, e.g., Marion Smiley, *Pragmatism as a Political Theory*, 63 S. CAL. L. REV. 1843 (1990); see also TIMOTHY V. KAUFMAN-OSBORN, *POLITICS, SENSE, EXPERIENCE* 13 n.17, 20 n.36 (1991).

pragmatic political theorists and legal scholars seem to share. First, pragmatism is best conceived as "a way of proceeding,"²³⁶ rather than a systematic school of thought associated with a defining set of claims.²³⁷ As a way of proceeding, and especially in the work of Pierce, the pragmatic process is modeled broadly on the notion of the scientific experiment, but sees no distinction between the fit subjects of scientific experiment and the domain of social and ethical inquiry.²³⁸ For the pragmatist, all of human knowledge and experience should be subjected to the process of testing in context.²³⁹ Hence, pragmatism is dedicated to fallibilism, subjecting moral, ethical, and political claims to practical human standards.²⁴⁰

As a direct result of its commitment to fallibilism, the pragmatist sees all human practices, standards, theories, models, and even concepts as open to revision.²⁴¹ This is consistent with the notion that truth is a phenomenon that arises and takes on meaning only in the context of inquiry, in which inquiry is a process that stems from the practical need to generate workable solutions to actual real-life problems.²⁴² Claims are "true," practices and actions are "right," and things are "good" only provisionally and insofar as they have positive practical consequences in actual contexts and they enable human beings to enrich their relations with one another and with their environment.²⁴³ These aspects of the pragmatic stance are consistent with the notion that reality is in large part socially constructed, that we live in a world shaped by the language we use and the concepts we develop in the context of our actual lives and social settings, which in turn shape us and expand or limit the possibilities of our comprehension.²⁴⁴

²³⁶ See Radin, *Pragmatist*, *supra* note 232, at 1706.

²³⁷ *Id.*

²³⁸ See Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1679; see also SCHEFFLER, *supra* note 233, at 2.

²³⁹ According to Radin, pragmatism is committed to "finding knowledge in the particulars of experience. It is a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality; and in favor of immanence, historicity, concreteness, situatedness, contextuality, embeddedness, narrativity of meaning." Radin, *Pragmatist*, *supra* note 232, at 1707.

²⁴⁰ Pierce coined the term "fallibilism." See SCHEFFLER, *supra* note 233, at 7-9, 20.

²⁴¹ See Smiley, *supra* note 235, *passim*; see also SCHEFFLER, *supra* note 233, at 9.

²⁴² This can be understood as an extension of Pierce's "pragmatic maxim" as applied to James's notion of truth. See SCHEFFLER, *supra* note 233, at 77-78, 103-04.

²⁴³ As James expressed, "[I]deas . . . become true just in so far as they help us to get in satisfactory relation with other parts of our experience." WILLIAM JAMES, *PRAGMATISM* 58 (1st ed. 1907).

²⁴⁴ As James said in reference to theories, "They are only a man-made language, a conceptual short-hand, . . . in which we write our reports of nature; and languages, tolerate much choice of expression and many dialects." *Id.* at 57. Dewey and George Mead first

The emphasis that modern pragmatism places on the notion of the lifeworld and the dependence of all human experience on language²⁴⁵ has particular relevance to the impasse for political theory presented by the supposed tension between liberty and community. For pragmatism, such a dichotomy is only a conceptualism²⁴⁶ which may or may not help us in the resolution of current "problematical situations" emanating from contemporary society which seem to implicate both liberty and community. Hence, for pragmatism, there is no sense in which the terms "liberty" and "community" have reality apart from the human social/political contexts which spawned them. As such, both terms taken individually or in opposition are open to revision or discard when subjected to fallibilism.

If pragmatism views the liberty/community dichotomy as a mere conceptualism, what would it put in its place and on what basis would substitute formulations used to forge a new understanding be promoted or justified? Pragmatism is often criticized on two grounds: first, that it lacks content, because it comes dangerously close to reducing to a crude form of instrumentalism; second, that, because pragmatism rejects foundationalism and severely limits the role of theory, it has no source for mounting a critique of existing concepts, institutions, and social practices that can be any better justified than the concepts, institutions and social practices it seeks to displace.²⁴⁷ Most simply put, how does pragmatism secure a toehold, a "standpoint," from which to judge or even mediate between contested visions of the relation of the person to society?²⁴⁸

A modern pragmatist like Margaret Jane Radin, who is aware of and concerned about these criticisms, holds that pragmatism's allied commitments to contextualism and fallibilism have inclusive, democratic implications that can also provide pragmatism with a critical component.²⁴⁹ In her view, contextualism and fallibilism make the theory especially well suited to the development of a pluralist ethical and political stance that would result from taking the lifeworlds of outgroups into account.

According to Radin, pluralism provides a source for curing the defects

developed the social epistemological implications of pragmatism's account of meaning and truth. See SCHEFFLER, *supra* note 233, at 145-46, 156-69.

²⁴⁵ However, Radin has expressed concern over whether too much emphasis is placed on language divorced from practice in modern pragmatism. See Radin, *Pragmatist*, *supra* note 232, at 1716 n.45.

²⁴⁶ I owe this point to Frank Michelman. See Michelman, *supra* note 56, at 1783-85.

²⁴⁷ See Smiley, *supra* note 235, at 1843-44; see also KAUFMAN-OSBORN, *supra* note 235, at 211-12 (discussing this point in connection with Richard Rorty's work).

²⁴⁸ See Radin, *Pragmatist*, *supra* note 232, at 1710.

²⁴⁹ *Id.* at 1710-11, 1723-26.

thought to inhere in pragmatism, as it has been traditionally conceived.²⁵⁰ First, including the perspectives of all groups in a society, even those whose life experience does not cohere with officially sanctioned versions of reality, provides a standpoint from which to critique the practices, values, institutions, beliefs, and concepts of the dominant culture that does not require a return to foundationalism. Secondly, such perspectives are a rich source of positive content which can infuse the pragmatic way of proceeding. This is so because they provide affirmative counter-conceptions of reality—they yield different contentful notions of the good, the right, and the true; they spawn different actions and practices and narratives; they declare different human situations and experiences to be problematic—and, in so doing, they generate numerous contexts of inquiry with determinate substance that can then be addressed in the pragmatic search for resolutions.²⁵¹

As promising as modern pragmatism may be for political philosophy in general and constitutional theory in particular, there are a number of important questions still unanswered. In its call for pluralism, modern pragmatism may place too much emphasis on the phenomenon of political communication and discourse as a source of social change through changing consensus. There seems to be an implied assumption that if marginalized groups can be included in the sanctioned political dialogue, if their conceptions, their notions of relevancy, and their practices are not ruled out of bounds at the outset but are instead given *prima facie* inclusion in the political forum of the dominant culture, then consensus (“good” coherence) can eventually emerge.²⁵² This approach to politics may simply not give enough attention to raw power relations in society and the difficulty of getting dominant social groups to cede willingly some of their power and privilege to individuals whom they have historically treated as resources rather than persons. There is nothing within pragmatism itself, however, that obviously conflicts with a commitment to finding a pragmatic solution to the problems of dominance and power. One way of attempting to develop such a solution would be for modern pragmatists to remember pragmatism’s emphasis on action as well as language.²⁵³

There is a more serious problem with pragmatism than its central focus on the connection between political discourse and democracy; pragmatism appears to have no method for distinguishing in principle between human practices that

²⁵⁰ *Id.* at 1723–26.

²⁵¹ This is the point I believe Radin is making in her discussion of “bad coherence” in the context of pragmatism. *See id.* at 1705–11.

²⁵² See KAUFMAN-OSBORN, *supra* note 235, at 158–216 for a critical discussion of what Kaufman-Osborn coins “the politics of talk” both in regard to critical theory and pragmatism.

²⁵³ This is another suggestion of Radin. Radin, *Pragmatist*, *supra* note 232, at 1716.

may and may not be antithetical to human flourishing.²⁵⁴ At a higher level of description, while pragmatism can mount an argument for taking the perspectives of all groups into account, it has no articulate basis for judging any of those perspectives as better than the other or for determining that they are objectively bad or good.²⁵⁵ From the perspective of the modern pragmatist, this is no criticism at all because, being antifoundationalist and antiobjectivist in conception, pragmatism denies that any ethical/political theory can point to objectively justifiable values to sanction the state's choices between the disparate norms generated by human beings in their embedded and varying life circumstances.²⁵⁶ At the same time, the pragmatic approach requires that the practical workability, the provisional validity of social practices, institutions, and concepts, be judged by reference to its impact on human lives actually lived.²⁵⁷ In addition, there is an aspect to this approach that considers some generalized, if minimal, conception of human flourishing.

The unwillingness of modern pragmatism to go beyond a general discussion of its method and to attempt to construct a description of some acceptable notion of human flourishing which can be linked to historical/social contexts,²⁵⁸ makes it difficult to understand exactly how pragmatism could provide a complete reconceptualization of the liberty/community paradigm in the context of actual constitutional decisions reflecting real division in society. Nonetheless, even as it stands today, modern pragmatism can provide numerous contributions to the process of developing a meaningful fundamental rights jurisprudence in conjunction with the Ninth Amendment and similar constitutional provisions.

First, it helps to explain why the categorical thinking that has infected the debate over the Ninth Amendment has been so fruitless by allowing us to focus explicitly on the need for a context-sensitive approach to constitutional issues. Second, it provides affirmative reasons why a case-by-case approach to the Ninth Amendment is to be preferred to a structural exploitation of its possibilities of the sort that libertarians favor—pragmatism rejects a treatment of political questions that prefers a resort to abstraction. Third, it repudiates the all or nothing approach to rights that possessive individualism seems to present.

²⁵⁴ See Cornel West, *The Limits of Neopragmatism*, 63 S. CAL. L. REV. 1747 *passim* (1990).

²⁵⁵ See RORTY, *MIRROR*, *supra* note 232, at 373–79; see also John R. Wallach, *Liberals, Communitarians, and the Tasks of Political Theory*, 15 POL. THEORY 581, 596–97 (1987).

²⁵⁶ It is Rorty's goal to demonstrate that there is no epistemological theory capable of justifying such objective standards. See RORTY, *MIRROR*, *supra* note 232, *passim*.

²⁵⁷ In this regard, refer to Radin's discussion of James. See Radin, *Pragmatist*, *supra* note 232, at 1715.

Finally, through its emerging attention to perspectivism, modern pragmatism reminds us that fundamental rights jurisprudence must take into account the world view of all our people, not just a privileged few.

Thus, even if we can say that modern pragmatism is incomplete without overtly embracing some conception of full human flourishing, it still has much to offer. Nonetheless, it may be that the second of the emerging political theories that I wish to discuss has something more to contribute to this problem. That theory is Aristotelian social democracy.

B. *Aristotelian Social Democracy*

I wish to explore the recent works of Martha Nussbaum to formulate my description of what she has coined "Aristotelian social democracy" and to explain why it may be a fruitful resource for supplanting the false liberty/community dichotomy and developing a fundamental rights jurisprudence that would illuminate the Ninth Amendment. In contemporary essays, Nussbaum has been exploring the possibility that the Aristotelian notion of full human flourishing might provide an alternative to liberalism.²⁵⁸ At the heart of much of Aristotle's work on politics and society lies the fundamental question: what is the good for human beings?²⁵⁹ It is Nussbaum's belief that controversies over justice cannot be resolved without first confronting this basic question.²⁶⁰ Her belief stands in contrast to the approach of political philosophers in the liberal tradition such as John Mill, or, even more recently, John Rawls, who face political questions with a steadfastly agnostic attitude toward the possessions, objects, experiences, activities, and opportunities that we ought to hold constitutive of a good human life.²⁶¹ It is also opposed to the libertarian conception of rights as individual, negative, and absolute.²⁶²

Nussbaum wishes to develop a new approach to politics by liberating the Aristotelian world view from its exclusionist, aristocratic origins and by

²⁵⁸ See generally Martha Nussbaum, *Aristotelian Social Democracy*, in LIBERALISM AND THE GOOD 203 (R. Bruce Douglas et al. eds., 1990) [hereinafter Nussbaum, *ASD*]; Martha Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 202-46 (1992) [hereinafter Nussbaum, *Social Justice*]; Martha Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, in OXFORD STUDIES IN ANCIENT PHILOSOPHY 145 (Julia Annas & Robert H. Grimm eds., 1988) [hereinafter Nussbaum, *NF&C*].

²⁵⁹ See Nussbaum, *NF&C*, *supra* note 258, at 147 (quoting from ARISTOTLE, THE POLITICS 1323a17-19); see also Nussbaum, *ASD*, *supra* note 258, at 208.

²⁶⁰ See Nussbaum, *NF&C*, *supra* note 258, at 150-52.

²⁶¹ See Nussbaum, *ASD*, *supra* note 258, at 210, 233; Nussbaum, *Social Justice*, *supra* note 258, at 214-15; Nussbaum, *NF&C*, *supra* note 258, at 152-53.

²⁶² See Nussbaum, *Social Justice*, *supra* note 258, at 229-34.

developing its distributive implications.²⁶³ Taking her lead from Aristotle, it is Nussbaum's view that "the things of which one cannot have too much and more is always better than less [are] the capabilities . . . out of which excellent functioning, doing well and living well, can be selected."²⁶⁴ From her perspective, all members of the society, not just the privileged few, ought to be entitled to pursue practical wisdom, and realizing this creates profound implications for distributive justice.²⁶⁵ Hence, from her point of view, the purpose of political arrangements is and ought to be "to bring every member [of society] across a threshold into conditions and circumstances in which a good human life may be chosen and lived,"²⁶⁶ and, as a result, distributive questions ought to be approached with that goal paramount. Most of Nussbaum's emphasis has been on the distributive implications of an egalitarian Aristotelian political theory,²⁶⁷ but there are significant consequences such a theory has for the general issue of fundamental rights and the Ninth Amendment. This is so because Aristotelian social democracy declares that the best society is one that organizes its legal concepts, including its approach to rights, to best provide the persons subject to it with the necessary conditions of their full human flourishing.²⁶⁸

It is the key piece in Nussbaum's argument that attention to human nature will yield, at an acceptable level of generality, just one determinate set of human functions from which correlative particular goods may be ascertained.²⁶⁹ Of course, it is this claim that liberal political theorists question.²⁷⁰ Nonetheless, in her view, these are the goods that lead to a fulfilling life because they enable us to effectuate a multiplicity of uniquely human functions by allowing us to develop a diversity of capabilities.²⁷¹ It is this last move, from capacity to function, that contains the implications for fundamental rights and constitutional theory that can be developed from Nussbaum's treatment of the Aristotelian vision.

First, given its concern with questions about the good for humans and the good society, Aristotelian social democracy legitimizes overt attention to

²⁶³ See, e.g., Nussbaum, *NF&C*, *supra* note 258, at 165–66.

²⁶⁴ See *id.* at 152.

²⁶⁵ See Nussbaum, *ASD*, *supra* note 258, at 234–40.

²⁶⁶ *Id.* at 209.

²⁶⁷ *Id. passim.*

²⁶⁸ See Nussbaum, *Social Justice*, *supra* note 258, at 214–23 (listing the human capacities from which correlative distributive claims and rights might be generated).

²⁶⁹ *Id.*

²⁷⁰ See, e.g., RAWLS, *supra* note 135, at 396 (discussing his "thin" theory of the good).

²⁷¹ See Nussbaum, *NF&C*, *supra* note 258, at 160–72.

normative values in constitutional analysis.²⁷² Second, it provides us with a coherent account of positive rights and embeds them in the notion of reciprocal responsibilities between the polity, the person, and other citizens.²⁷³ As such, it exemplifies the inadequacy of current approaches to fundamental rights and the Ninth Amendment that are limited to negative rights on the model of possessive individualism.²⁷⁴ Aristotelian social democracy possesses these features because it is attuned to the nature and complexity of the interrelation of people, their community, and members of the civil society. It inherits from Aristotle's philosophy a real appreciation for the connection between potentiality and actuality in the context of personhood and a rejection of the categorical distinction between the public and the private.²⁷⁵ It comprehends the possibility of diversity within social context and the moral responsibility of the good society to provide to its citizens those opportunities that are necessary to the development of their capacities into functions.²⁷⁶ It does all of these things not by viewing the person as removed from the social setting with static desires, attitudes, and talents fully blown, but, rather, it is sensitive to the interaction between the person, other members of the community, and the community's institutions, both social and governmental.²⁷⁷ Hence, it has a dynamic conception of personhood in social context and it is resultingly sophisticated about choice and autonomy.²⁷⁸ Thus, to the extent that Aristotelian social democracy can provide a basis for a new conception of rights, that conception would be infused with the notion of reciprocal responsibilities between the person and the formal government, and members of the polity acting together in civil society.

If Aristotelian social democracy provides us with the means to articulate the need for positive rights in any good society, it also intensifies the necessity of focusing on standards. If members of a community are to be allowed to develop fundamental rights that provide them with entitlements as well as protections from interference, it is even more important to be able to analyze human practices and choose those that promote human flourishing, while

²⁷² See Nussbaum, *Social Justice*, *supra* note 258, at 214.

²⁷³ *Id.* at 223–29.

²⁷⁴ *Id.* at 229–35.

²⁷⁵ For an interesting discussion of the manner in which Aristotle justified privacy by reference to the public sphere and public virtue, see JUDITH A. SWANSON, *THE PUBLIC AND THE PRIVATE IN ARISTOTLE'S POLITICAL PHILOSOPHY* 207–11 (1992).

²⁷⁶ See Nussbaum, *Social Justice*, *supra* note 258, at 224.

²⁷⁷ The Aristotelian understanding of the role of habituation in personality formation is particularly instructive in this regard. See ARISTOTLE, *NICOMACHEAN ETHICS*, bk. II, 2.1–2.2 (Terence Irwin trans., 1985).

²⁷⁸ See Nussbaum, *ASD*, *supra* note 258, at 238–40.

discarding those that do not.²⁷⁹ By insisting that some attention to the notion of human excellence and well-being can provide us with standards to use to order our society that do not require a return to Platonic foundationalism,²⁸⁰ Nussbaum opens up new sources for developing a more contentful conception of fundamental rights through the Ninth Amendment and other constitutional provisions.

Finally, Aristotelian social democracy's focus on human flourishing contains an implicit prohibition against one sector of the community treating another as a resource for bringing about its own interests.²⁸¹ Hence, it insists that any meaningful conception of fundamental rights should focus on this phenomenon overtly and should provide for it.²⁸² Moreover, Aristotelian social democracy's promise in this regard is intensified by its refusal to treat the private sphere as if it could be meaningfully separated from the public domain.²⁸³ This stands in stark contrast to the attempts to develop fundamental rights within the confines of the liberty/community dichotomy, a structure that is easily manipulated to allow the dehumanization of some for the interests of others. As promising as Aristotelian social democracy is in this regard, however, it has not developed an overt explanation, by reference to rights or otherwise, that can articulate whether and under what conditions the good society can justifiably require persons to sacrifice for the communal welfare.²⁸⁴ It is over the issue of rights and autonomy and their connection to political participation that our third emerging political theory—liberal communitarianism—can perhaps make the greatest contribution.

C. Liberal Communitarianism

As the debate over the Ninth Amendment would indicate, over the past decade or so liberals and communitarians have engaged in a heated exchange over the desirability of their competing political visions.²⁸⁵ Communitarians

²⁷⁹ Nussbaum's discussion of relativism is illuminating in this regard. See Nussbaum, *Social Justice*, *supra* note 258, at 209–12.

²⁸⁰ Nussbaum articulates this aspect of Aristotelian social democracy in the context of her discussion of the modern objections to metaphysical realism. See Nussbaum, *Social Justice*, *supra* note 258, at 212–14, 223–29. Nussbaum has identified some ten “basic human functional capabilities” that she holds to be central to human excellence and well-being. *Id.* at 222.

²⁸¹ See Nussbaum, *NF&C*, *supra* note 258, at 165–66.

²⁸² See Nussbaum, *Social Justice*, *supra* note 258, at 226–27.

²⁸³ See SWANSON, *supra* note 275, *passim*.

²⁸⁴ See Nussbaum, *Social Justice*, *supra* note 258, at 226.

²⁸⁵ Amy Gutmann has summarized the principal criticisms of both camps. See Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 313 (1985). See

have critiqued liberalism for its commitment to abstract individualism,²⁸⁶ its skeptical stance about the possibility of ascertaining any one conception of the good,²⁸⁷ its promotion of the ideal of the neutral state,²⁸⁸ and the internal consistencies thought to be generated by its simultaneous enthusiasm for each.²⁸⁹ For their part, liberals have claimed that communitarianism undervalues personal autonomy and self-determination,²⁹⁰ that it is capable of justifying repressive and reactionary communal regimes,²⁹¹ that it underestimates the problems posed by the conflicting interests of the persons making up a political community,²⁹² and that it is an unworkable political ideal in the setting of modern industrialized democracies with large and disparate populations.²⁹³

Much of the liberal/communitarian debate can be understood to arise from the false dichotomy between liberty and community that is also at the heart of the controversy over the Ninth Amendment.²⁹⁴ Nonetheless, in recent years,

generally Allen E. Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 ETHICS 852 (1989); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 6-23 (1990); Gordon Graham, *Recent Work in Political Philosophy—The Attack on Liberalism*, 40 PHIL. Q. 515 (1990) (book review).

²⁸⁶ Michael Sandel's and Charles Taylor's works probably constitute the best known of these critiques. See generally MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

²⁸⁷ This is one of the main aspects of John Rawls's work to which communitarians object. See, e.g., Wallach, *supra* note 255, at 589.

²⁸⁸ See Michael J. Sandel, *The Political Theory of the Procedural Republic*, 93 REVUE DE METAPHYSIQUE ET DE MORAL 57 *passim* (1988) [hereinafter Sandel, *Procedural Republic*]; Michael J. Sandel, *Morality and the Liberal Ideal*, NEW REPUBLIC, May 7, 1984, at 15, 15-17.

²⁸⁹ Charles Taylor's arguments can be understood, in toto, as the claim that classic liberalism is self-refuting because it attempts to found individual rights on destructive principles. See TAYLOR, *supra* note 286 *passim*.

²⁹⁰ See KYMLICKA, *supra* note 133, at 199-205.

²⁹¹ See, e.g., Carlos S. Nino, *The Communitarian Challenge to Liberal Rights*, 8 LAW & PHIL. 37, 41-42 (1989).

²⁹² See, e.g., Wallach, *supra* note 255, at 599-600.

²⁹³ *Id.* at 594.

²⁹⁴ However, Stephen A. Gardbaum implies that much of the liberal/communitarian debate can be attributed to a misunderstanding about the different ways a theorist might be committed to a conception of community, at different levels of inquiry. Thus, he distinguishes between those who hold that the self is in large part a social construction (communitarianism about the sources of "agency"); those who are committed to the notion that values emanate from community (metaethical communitarianism); and those who hold substantive communitarian values (strong communitarianism). It is his point that none of these commitments logically entails the other and that all three actually relate to three

some political theorists have attempted to fashion a conception of the just society that seems to overcome the impasse presented by the entrenched positions of the contenders for individual rights and communal goods. This emerging doctrine of liberal communitarianism is distinguished from general communitarianism by its continued commitment to the importance of rights, although their theoretical basis and their relationship to communitarian intuitions about the importance of the good are contested.²⁹⁵ Nonetheless, liberal communitarianism has more promise for articulating a workable relation of the person to the greater society than either liberalism or communitarianism standing alone.²⁹⁶ Moreover, it shares certain features with modern pragmatism and Aristotelian social democracy that are intriguing.

The starting point for many liberal communitarians is to assert that liberalism²⁹⁷ is often wrongly criticized because its claims and premises are

different debates in political theory. See Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 *passim* (1992).

²⁹⁵ Compare Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989) with C. Edwin Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491 (1989).

²⁹⁶ The development of liberal communitarianism is complex and at times confusing. Some theorists working from this stance have begun by asserting that the works of John Rawls and Ronald Dworkin have been misunderstood by communitarians and contain a thicker theory of the good than is often appreciated. This is the starting point for much of Kymlicka's work. See, e.g., KYMLICKA, *supra* note 133, at 1-19. Others attempt to meet each of the significant communitarian criticisms of liberalism in innovative ways. See, e.g., Nino, *supra* note 291, at 43-52. Stephen A. Gardbaum has shown that one can be committed to community at different levels of description. For instance, it is possible for one to see the self as a social construct in large part without being logically required to adopt substantive communitarian values. See generally Stephen A. Gardbaum, *supra* note 294. For an intriguing discussion of the various strands of liberal communitarianism, see Gerald Doppelt, *Beyond Liberalism and Communitarianism: Towards a Critical Theory of Social Justice*, 14 PHIL. & SOC. CRITICISM 271 *passim* (1988).

²⁹⁷ "Liberalism" is a highly ambiguous term as it has many strains and varieties. Classic liberalism can be associated with libertarianism. Its most well-known modern adherent is Robert Nozick. See *supra* text accompanying notes 115-21. Libertarianism should be distinguished from neo-conservatism, in which the market is justified by reference to normative ideals other than personal freedom. See KYMLICKA, *supra* note 145, at 155 n.1. Utilitarian liberalism is traceable to the works of Jeremy Bentham and John Stuart Mill. See *supra* text accompanying notes 122-28; see also KYMLICKA, *supra* note 133, at 9-49. The work of R.M. Hare exhibits a modern version of utilitarianism in philosophy. See R.M. Hare, *Rights, Utility, and Universalization*, in *UTILITY AND RIGHTS* 106 (R.G. Frey ed., 1984). The work of John Rawls is an attempt to develop a liberal theory out of contractarian principles that avoids the sacrifice problem in utilitarianism. See RAWLS, *supra* note 135, at 11, 22.

misunderstood.²⁹⁸ In particular, liberal communitarians often assert that abstract individualism and value skepticism are not necessary components of contemporary forms.²⁹⁹ This initial strategy focuses on *modern* liberalism, as exemplified by the work of John Rawls and Ronald Dworkin, and seeks to separate it from nineteenth century varieties.³⁰⁰ When this distinction is made, liberal communitarians are able to concede that orthodox liberalism is problematic; at the same time they can attempt to decouple modern welfare state liberalism from the epistemological and metaphysical commitments most condemned by communitarians.

Two features that obviously distinguish modern liberalism of the sort propounded by Rawls and Dworkin from classic nineteenth century variants are a commitment to egalitarianism³⁰¹ and a refusal to treat property rights as trumps, capable of blocking attempts by the modern state to institute distributive schemes that might be legitimated by reference to that egalitarianism.³⁰² More importantly, both include a notion of personhood in their theories that is not as ahistorical, extrasocial, and atomistic as previous incarnations.³⁰³ The challenge that both Rawls and Dworkin have set can be understood in some sense as the challenge to formulate modern versions of liberalism that are sophisticated about the social construction of reality and personhood but that also can explain and legitimate certain individual rights that protect persons from being completely vulnerable to the larger society.³⁰⁴ It is beyond the scope of this Article to outline the details of the manner in which both strive to meet that challenge or to assess the success of each—Rawls's work can be understood as a form of Kantian constructivism³⁰⁵ and Dworkin's as a type of coherence theory rooted in the principles of Western

The varieties of liberalism differ in their foundations and in their approach to rights. For a discussion of the forms of liberalism, see generally JOHN GRAY, *LIBERALISMS: ESSAYS IN POLITICAL PHILOSOPHY* (1989).

²⁹⁸ See, e.g., KYMLICKA, *supra* note 133, at 9–14.

²⁹⁹ *Id.* at 13–19.

³⁰⁰ See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); RAWLS, *supra* note 135; John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *PHIL. & PUB. AFF.* 281 (1985) (explaining and modifying his basic theory).

³⁰¹ See, e.g., RAWLS, *supra* note 135, at 60–90 (explaining how egalitarian principles modify distributions based on efficiency); Ronald Dworkin, *Comment on Narveson: In Defense of Equality*, 1 *SOC. PHIL. & POL'Y* 24 (1983).

³⁰² See RAWLS, *supra* note 135, at 270–74.

³⁰³ See KYMLICKA, *supra* note 133, at 47–64; see also Gardbaum, *supra* note 294, at 758–59.

³⁰⁴ See KYMLICKA, *supra* note 133, at 47–64; Gardbaum, *supra* note 294, at 759–60.

³⁰⁵ See John Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. OF PHIL.* 515 (1980).

democratic constitutionalism.³⁰⁶ The point made by liberal communitarians about Rawls and Dworkin is that neither theorist unambiguously embraces the view of the self that is so vehemently objected to by communitarians. Moreover, their ability to leave abstract individualism behind has motivated other theorists to develop logical space in liberal political theory that can be extended and exploited to make room for communitarian concerns. Hence, the first move in crafting liberal communitarianism is to recognize the impact of the social context on our sense of self and to take into account social effects on the formation of our interests.

The retreat from possessive individualism found in the works of Rawls and Dworkin that is being exploited by other thinkers also must be related to the issue of value skepticism. Merely jettisoning an outmoded model of the self is not enough to transform liberalism into a theory that can accommodate communitarian intuitions. Some notion of the good, in which the good is prior to the right, is required.³⁰⁷ While at the highest level of abstraction and generality, a liberal may be willing to concede that each of us has the essential interest of leading the good life,³⁰⁸ it is often thought that what constitutes such a life cannot be given any determinant content because it is not possible to root such a judgment in unassailable foundations and to validate it objectively according to the epistemological standards of the Enlightenment tradition.³⁰⁹ In liberalism it has often been assumed that those standards are the only standards worth having. Hence, empiricism reigns in the scientific sphere, and skepticism prevails in the political and ethical domains of the classic liberal tradition.³¹⁰

This apparently creates two options: to construct a political theory in which no particular conception of the good is privileged but rather all are tolerated, or to accede to those ends stipulated or chosen by the social group with the understanding that no end chosen is any more capable of rational validation than another.³¹¹ The "procedural republic" of the modern liberal state can be seen as representing an uneasy commingling of both.³¹² Our social ends are to be established as a function of legislative enactments that constitute the positive law, limited by the principles of toleration and individual freedom that are

³⁰⁶ See Gardbaum, *supra* note 294, at 742-44.

³⁰⁷ See Nino, *supra* note 291, at 41-42. However, it is important that the conception of the good be sophisticated and complex enough to comprehend the different levels of human experience to which notions of the good relate. Baker has pointed this out in his analysis of individual, group, and "statewide" goods. See Baker, *supra* note 295, at 495.

³⁰⁸ See KYMLICKA, *supra* note 133, at 10.

³⁰⁹ Kymlicka's discussion of the possibility that one could be mistaken about the justification for one's values is a variant of this argument. See *id.* at 11-12.

³¹⁰ See KAUFMAN-OSBORN, *supra* note 235, at 95-96.

³¹¹ See Sandel, *Procedural Republic*, *supra* note 288, at 64-68.

³¹² *Id.*

allegedly enshrined in constitutional documents. Liberal communarians challenge that description and understanding from two perspectives.

First, they assert that it limits liberalism to a thinner theory of the good than is necessary and, second, that liberalism properly reformulated and understood has more critical power to challenge the ends imposed by the positive law than previously appreciated.³¹³ Hence, liberal communarians have attempted both to formulate a thicker theory of the good within the liberal tradition and to establish a basis from which some values can be treated as justifiable, in a manner that does not require reliance on an implausible and outmoded foundationalism.³¹⁴ These strategies are linked. The first embraces toleration as a positive good, not a neutral procedural device.³¹⁵ The second exploits the political practice of communicative political discourse (sometimes referred to as "communicative action" or "dialogic politics")³¹⁶ as a source for a very limited set of values and rights that can be validated at least across Western democratic cultures and perhaps across cultures in general.³¹⁷ It is this second aspect of liberal communarianism that is of greatest interest here, because it suggests a way in which some notion of rights, even on a negative model, might be articulated coherently with the insights about the person and the community contained in modern pragmatism and Aristotelian social democracy.

The primary consequence of rejecting the liberty/community dichotomy is the realization that neither the claims of the person nor the claims of the community ought to be considered absolute. Moreover, such a rejection treats the claims of the person and of the community in dynamic interaction; the claims of each are not static and universal but must be related to particular socio-historical contexts. Given these implications, what conception of rights might be developed outside of the limiting framework of the liberty/community paradigm? Liberal communarians wish to answer this question without falling prey to the twin perils of foundationalism or relativism. Moreover, they seek to make clear the latent implications of our intuitions that the good community does not require the complete sacrifice of some of its members for the greater good. They attempt to do so by developing implications for rights that can be

³¹³ See, e.g., Doppelt, *supra* note 296, at 284-91.

³¹⁴ Some would argue that no form of foundationalism is acceptable, even one that is consistent with claims about the social construction of reality. Jürgen Habermas's work is often criticized as re-introducing foundationalism. See *infra* text accompanying notes 316-21.

³¹⁵ See, e.g., Nino, *supra* note 291, at 48-52.

³¹⁶ The term "communicative action" comes, of course, from the work of Jürgen Habermas, while I borrow "dialogic politics" from Baker. See *infra* text accompanying notes 318-24; see also Baker, *supra* note 295, at 513.

³¹⁷ See *supra* text accompanying notes 273-75.

projected from the normative values and practices associated with democracy and, particularly, the practice of truly communicative political discourse. The recent work of Jürgen Habermas has had a profound effect on this project.

Habermas's political philosophy is so intricate and complex that giving a detailed account of its salient features is beyond the scope of this article.³¹⁸ It is heavily influenced by pragmatism³¹⁹ and the works of Weber and Marx,³²⁰ and it also contains a unique reformulation of Kant's transcendental argument in social context.³²¹ Habermas's key insight, the one that has most influenced liberal communitarianism, is that true dialogue between members of the polity is a necessary feature of any legitimate governmental system and that that dialogue, that communicative action, presupposes certain conditions between the members of the polity.³²² Habermas's work can be understood as constituting the development of a kind of logical pragmatics of the practice of sincere political discourse in a democratic regime.³²³ The rights that the members of the community must have are developed from the conditions precedent to participation in such a discourse. Hence, political rights are of central importance—things like free speech, voting, and the like. Community practices that hamper the individual's ability to participate by refusing equality of respect and access to political fora cannot be justified. By this approach, liberal communitarianism commits itself to at least one given, to at least one social institution that is not to be subjected to fundamental criticism—the institution of political discourse.³²⁴ To the extent that negative rights such as privacy are to be countenanced, they must be related to one's ability to fully function as a participant in the ongoing political dialogue, which is essential to any good community.

While the distributive implications of such an approach to rights are

³¹⁸ For one of the earlier general descriptions of Habermas's work, see THOMAS MCCARTHY, *THE CRITICAL THEORY OF JÜRGEN HABERMAS* (1978).

³¹⁹ See, e.g., JÜRGEN HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 91–112 (Jeremy Shapiro trans., 1971).

³²⁰ See generally TOM ROCKMORE, *HABERMAS ON HISTORICAL MATERIALISM* (1989).

³²¹ See KAUFMAN-OSBORN, *supra* note 235, at 165 n.15, 169.

³²² See Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 43–115 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990); see also KAUFMAN-OSBORN, *supra* note 235, at 162–75; C. Edwin Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895, 901 (1985). But see 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 237–337 (Thomas McCarthy trans., 1987) (demonstrating the author's shift from a Kantian conception of the ideal speech situation to a more socially grounded analysis).

³²³ See generally JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (Thomas Burger trans., 1989).

³²⁴ See Nino, *supra* note 291, at 45.

unclear and the attitude of such a view toward disparate power relations in civil society is naive,³²⁵ its primary contribution to fundamental rights is to insist on the overarching importance of participation in the decision processes of the polity. One's negative rights are those that are important to promote one's positive participation. In this approach to rights, liberal communitarianism exploits the pragmatic implications of political discourse and can sustain a conception of rights that is continuous with the emphasis on entitlements stemming from Aristotelian social democracy. Although there are many questions and unsolved problems remaining in liberal communitarianism, it is significant for my purpose because it mounts an argument for rights which does not suffer from the limitations of the liberty/community dichotomy.

D. Convergence

While modern pragmatism, Aristotelian social democracy, and liberal communitarianism each have their differences and weaknesses, they all converge in a number of areas. It is this phenomenon of convergence that provides the greatest promise for the development of an approach to politics and constitutional adjudication that does not rely on the barren dichotomy between liberty and community. I will close with a description of these points of agreement and an analysis of how they might be used to approach a case as difficult as *Bowers v. Hardwick*.³²⁶

The first common theme found in these theories is a sensitivity to the social construction of personhood. Liberal communitarianism concedes that our notion of self, our values, even our interests and preferences are to a great extent a function of our particular social milieu.³²⁷ In contrast to the quite static conception of socially-constructed personhood found in communitarian theories, liberal communitarianism asserts that individuals *can* meaningfully question their world views, values, interests, and even their own personality traits *within* their social context and, as a result, *can* revise their life plans. Autonomy is then valued for its ability to promote such deliberation.

Pragmatism's focus on the lifeworld, of course, demonstrates that personhood is to a great extent a social construct. Nonetheless, it holds out the possibility of personal change and growth beyond one's experiences through the process of testing practices, beliefs, and institutions for their practical consequences in context and also through the contribution that the various

³²⁵ See KAUFMAN-OSBORN, *supra* note 235, at 162–216.

³²⁶ 478 U.S. 186 (1986).

³²⁷ See Wallach, *supra* note 255, at 587 (discussing Rawls's recent work in this regard).

perspectives of members in the polity can bring to political discourse.³²⁸

Finally, Aristotelian social democracy is rooted in a metaphysical tradition that has always contemplated the power of society to habituate citizens to certain values, roles, and world views.³²⁹ Like modern pragmatism, with which I have argued it ought to be closely allied, Aristotelian social democracy also contemplates that the perspectives of the various groups within the polity can provide a source for deliberation over values, practices, and institutions.³³⁰ The important point to realize about all three theories is that none relies on an ahistorical, atomistic, universalistic account of the self, nor on its polar opposite, a completely organic, totally socially determined conception of personhood. Hence, none could be expected to generate a constitutional approach to questions of liberty and rights that would founder on the rocks of the liberty/community dichotomy.

A closely related point of convergence in these theories is that each rejects the reliance of Western culture on dualistic opposition and the normative dualism that results. In modern pragmatism, Aristotelian social democracy, and liberal communitarianism, the complementarity of individualization and socialization, of autonomy and solidarity stemming from the process of developing a personal identity, is recognized and points to a general conception of reality that does not rely on a series of officially chosen and sanctioned dichotomies that are justified by unwarranted appeals to "nature."³³¹ Dualistic oppositions that are so closely associated with Western thinking, such as self/other, natural/social, fact/value, reason/emotion, and masculine/feminine, have no special privilege in any of the theories that I have been discussing.

The third feature shared by these views is a less dogmatic conception of rationality. Each recognizes the connection between knowledge and experience, the ability of context and perspective to acquaint us with what is important to treat as a political problem requiring resolution.³³² Each in some sense recognizes that rationality and the requirement to "relativize" interpretation can be compatible. Each acknowledges that rationality is possible in a social context, notwithstanding the social construction of reality, even though the

³²⁸ See Radin, *Pragmatist*, *supra* note 232, at 1723–26. For additional discussion of pragmatism's view of personhood, see Michelman, *supra* note 232 and Radin, *supra* note 232.

³²⁹ See ARISTOTLE, *supra* note 277, at bk. II, 2.1–2.2.

³³⁰ See Nussbaum, *ASD*, *supra* note 258, at 234–36.

³³¹ On pragmatism, see, for example, Radin, *Pragmatist*, *supra* note 232, at 1707–08. Such distinctions are also antithetical to the Aristotelian tradition.

³³² For instance, the evolution in John Rawls's work from a less abstract to a more contextually located theory can be understood as constituting "concessions" to pragmatism in this regard. See Wallach, *supra* note 255, at 583–85.

ideal of foundationalism has been discredited.³³³ This insight has the power of saving constitutional analysis from too rigid a reliance on the all-or-nothing propositions represented by abstract rules.³³⁴ It can keep us from conceiving constitutional decisions as nothing but a series of zero-sum games, in which either the individual *or* majority wins.

A fourth point of convergence in these approaches, although one that is more nascent than overt, is the coherence of each with the normative value of self-realization. The liberal communitarian enthusiasm for autonomy can really be understood and justified only by reference to a more robust conception of the good founded in the notion of full human flourishing.³³⁵ Similarly, the problems that modern pragmatism has with content and relativism can be addressed when its insistence that social practices and institutions be tested in context is understood to be an insistence on human flourishing as the normative standard that ought to inform our political judgments. The notion of full human flourishing, of self-realization, makes up the core of the distinctly Aristotelian approach known as Aristotelian social democracy.³³⁶ Finally, the norm of self-realization includes the best intuitions of both the proponents of liberty and community and has real promise as a value which can coherently sustain constitutional adjudication better than liberty or community, dichotomously understood.³³⁷

The fifth and final point of agreement between liberal communitarianism, modern pragmatism, and Aristotelian social democracy is the interdependent connection that each generates between rights and community by way of the social practice of communicative action. Liberal communitarianism treats the phenomenon of dialogic politics as the only social institution that can be taken as given and ought to be treated as immune from the possibility of discard, so long as the practices associated with it are open to all. Truly communicative political discourse promotes both communal and personal ends and also promotes real participation.³³⁸ It sustains and advances the community, while it nurtures people and helps them to realize the broad array of their own special human capacities. This approach to communicative political discourse is shared by pragmatism and Aristotelian social democracy.³³⁹ Those two theories, along

³³³ If this was not the case, coherence theories of truth would be unintelligible.

³³⁴ See Wallach, *supra* note 255, at 602.

³³⁵ See Nino, *supra* note 291, at 51.

³³⁶ See Nussbaum, *NF&C*, *supra* note 258 *passim*.

³³⁷ In that connection, see Baker's treatment of First Amendment issues from the perspective of self-realization. See generally C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1990).

³³⁸ See Nino, *supra* note 291, at 45.

³³⁹ For a discussion of pragmatism and communicative political discourse, see KAUFMAN-OSBORN, *supra* note 235, at 162. For a discussion of Aristotelianism and

with liberal communitarianism, conceive of rights as those things that the members of the polity need in order to facilitate their participation in the most social and democratic of practices. In so doing, all three theories link rights with community in a manner that does not implicate the old clash between liberty and community that has provided such an obstacle to more fruitful approaches.

If modern pragmatism, Aristotelian social democracy, and liberal communitarianism share commitments to the social construction of personhood, a rejection of dualism, a less dogmatic approach to rationality, the normative value of full human flourishing, and a conception of rights that links them to community through the phenomenon of communicative discourse, what can these shared points of agreement contribute to our understanding of all the questions for constitutional theory that the Ninth Amendment generates? I hope to be able to suggest the outlines of that contribution in my discussion of *Bowers v. Hardwick*.³⁴⁰

How might *Bowers* have been approached if the Supreme Court was willing to face the question of fundamental rights using a combination of modern pragmatism, Aristotelian social democracy, and liberal communitarianism? What would the opinion have looked like if neither the claims of the individual nor the claims of the community were treated as static and absolute, as requiring a choice between liberty or community?

From modern pragmatism, the Court would have inherited a methodology, a way of proceeding, committed to contextualism, fallibilism, and perspectivism. As a result, the actual realities of plaintiff Hardwick's desire to practice private homosexual conduct within a real community would have had to have been considered and related to broader political issues stemming from the general society. Aristotelian social democracy would require that the Court seriously consider the connection between Hardwick's sexuality and his claim to full human flourishing, as well as to the community's worry about the impact of his homosexuality on its welfare. Finally, liberal communitarianism would insist that the Court focus on the community's desire to control Hardwick's private sexual acts and his prima facie entitlement, as a member of the community, to meaningful participation in its political discourse. What facts, issues, questions, and concerns that the Court did *not* consider in *Bowers* would these combined approaches have made relevant?

Initially, the Court would have had to consider that Hardwick's community—Georgia—is one heavily influenced by religious traditions opposed to homosexual conduct.³⁴¹ This raises the very serious question of whether and

communicative political discourse, see Wallach, *supra* note 255, at 602–03.

³⁴⁰ 478 U.S. 186 (1986).

³⁴¹ Significantly more of Georgia's citizens profess adherence to organized religion

how much religious views ought to dominate on the state level, when the federal system of government is allegedly committed to neutrality, if not secularity, on religious questions. Through its reliance on the liberty/community dichotomy, the Court was able to avoid facing the very difficult political and normative questions raised by the influence of religious beliefs on Georgia's legislature. In addition, the Court might have focused on the fact that sexual orientation seems quite recalcitrant to social conditioning. Was Hardwick's desire to engage in homosexual sex a core aspect of his person like skin color and gender? Who should decide this? If perspectivism matters at all, at a minimum the actual life experience of homosexuals with regard to this issue, not just the heterosexual majority's viewpoint, should be consulted. This is especially true in a circumstance in which there is no empirical evidence that can be invoked to settle the question.

If the ability to have a sexual outlet was critical to Hardwick's personhood, how should the issue of full human flourishing be addressed with regard to homosexuality? Should any community be able to cut off an individual's ability to find an outlet for sexual expression? How does sexual expression intersect with the ability of persons to form long-lasting intimate associations? How do intimate associations of that sort affect one's capacity to develop as a fully functioning human being? Can a community flourish when some of its members may not pursue love relationships of a certain sort? Would allowing homosexual expression in the face of the general community's disapproval create a slippery slope with regard to other forms of sexual orientation, such as sadism and pederasty, that seem to bring far too much risk to society?

Given the probability that homosexual acts will not be prevented by Georgia's statute, what about the possibility for selective enforcement? What is the effect on the welfare of the community when it possesses criminal statutes that can easily be used to harass and target some, but not all, of its members? What of the connection between Hardwick's political opportunities and his homosexuality? Are homosexuals treated as members of the community, or is their speech silenced and their participation excluded from the political process? Are homosexuals marginalized in the same way as other minority groups? What of the symbolic significance of Georgia's attempt to police sexuality and gender roles? Does *Bowers* actually implicate broad issues for gender that

than those who do not. Of those describing themselves as religious adherents, the majority belong to some form of the Baptist faith which is commonly understood to condemn homosexuality. For a statistical survey of religious affiliations in the State of Georgia, see CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES 1990: AN ENUMERATION BY REGION, STATE, AND COUNTY 94-109 (Martin B. Bradley et al. eds., 1992). It is a reasonable assumption that these factors have been influential in producing Georgia's legislation banning certain sexual acts.

affect many more sectors of the society than just homosexuals and more localities than just Georgia?

All of these questions are extremely hard to answer, but all are essentially important to any meaningful approach to the issues for the person and the community that *Bowers* presents. For many, the type of concerns that these questions raise ought to be confined to the legislative arena, but the availability of judicial enforcement of rights already concedes that the legislative arena often does not allow for the kind of inquiry that could provide a coherent approach to fundamental rights. If we agree that the courts should act as some refuge to persons when their conduct is controlled by the community, do we want to determine whether, how, and why to enforce individual rights, rather than be restricted to a barren and outmoded paradigm like the liberty/community dualism? To allow the liberty/community dichotomy to dictate is to obscure difficult questions about power relations in the general society and about the real costs to the person and to the group when both must mediate their goals and desires in light of the other. Moreover, it causes us to think of the relation of the person and her community statically, and it prevents us from developing flexible fact-sensitive approaches to the particular problems of our society as they develop.

The reconceptualization of Hardwick's claim by way of the combined insights of modern pragmatism, Aristotelian social democracy, and liberal communitarianism does not countenance the resolution of the very difficult and important issues raised for the person, the community, and the country at large by mechanical reference to majority will, history, or even past decisions on privacy. Rather, it requires that we face up to the normative value choices that are obscured by the liberty/community dichotomy, and we take seriously the claims of outgroups that current approaches to rights have limited relevance to their condition.

These theories and their joint rejection of the liberty/community dichotomy have promise not only for the fundamental rights issues raised by the Ninth Amendment but to rights claims in general, both enumerated and unenumerated. They could be used with great effect in other areas where the liberty/community antinomy seems to inhibit rather than promote dialogue, because it rules out of bounds the skepticism about rights on a negative and individualist model felt by many groups. For now, the essential point is that without attention to the sorts of questions, issues, and concerns that the liberty/community polarity prevents, no coherent fundamental rights jurisprudence is likely to emerge that will make the current debate over the Ninth Amendment fruitful and significant rather than intractable and tedious.

VI. SUMMARY

The immediate purpose of this Article has been to explain why there has been such an intense debate over the meaning and uses of the Ninth Amendment in the face of the Supreme Court's unwillingness to use it to decide actual constitutional controversies. In so doing, I have related the Ninth Amendment to the broader topic of unenumerated rights, and, by that process, I have revealed what is really at the bottom of the ceaseless contention over it, namely the liberty/community paradigm. In this way, the Ninth Amendment has functioned as a foil for demonstrating the power of that paradigm to limit our constitutional understanding of fundamental rights and to impede political progress for marginalized groups. The liberty/community dichotomy need not continue to strangle the development of a coherent conception of fundamental rights—emerging new political theories stand in the wings and point the way to a new conception of the person and society. It is my hope that some day these theories will have as much legitimacy in dialogue over the purpose, nature, and meaning of the Constitution as the political theories of yesterday, which have too long restricted the boundaries of our ingenuity.

